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TWENTY-FIRST BIRTHDAY

WITH this issue the *Modern Law Review* completes its twenty-first volume, and the Editorial Committee feel that it is appropriate to take stock of what has been done during the years since the first number was offered to the legal profession in June of 1937.

The Editorial Committee of that time, of whom half are still active members, set out to produce a legal periodical which in addition to discussing legal topics in a professional and scholarly way would attempt to conduct these discussions against the background of the contemporary society in which the law functions, and particularly, of course, of our own English society. This, we felt would often show that the existing rules were no longer adequate in the conditions of the present-day world, and we undertook to make constructive proposals for legal reform as and when opportunity offered.

How far we have achieved our objectives is for our readers to judge. We are ourselves more conscious of the difficulties inherent in our task than we were at the beginning. If we have not accomplished much of what we set out to do, we feel that we have helped to widen the horizons of English lawyers, and stimulated some worth-while discussions. We take pride in the fact that the present Lord Chancellor, Viscount Kilmuir, in a letter congratulating "the *Modern Law Review* on attaining its majority," noted the fact that "the *Review* has succeeded in retaining its essential modernity" and that "its articles are often provocative and always thought-provoking." He said further that he had "always found it both entertaining and instructive when there is a question of principle or reform to be decided."

The *Review* was floated on a gift of £30 from the Behr Trust and of £10 from the late Professor Jolowicz, which paid the expenses

of incorporation. It has always managed to pay its way, though during the war years its survival was often problematical. It had the advantage of help and advice from members of its Editorial Board, two of whom, John G. Foster and Professor A. L. Goodhart, are still members—the experience of the latter as Editor of the *Law Quarterly Review*, always placed unstintingly at our disposal, has been of particular value. We had the blessing and support of several judges of great distinction, among whom I may mention Lords Macmillan and Wright and Goddard J., as he then was. But, above all, we had the help then and now of a number of able lawyers, both at home and abroad, who were willing to spend much time writing articles and notes, and reviewing books. That so many eminent academic lawyers should have helped us so generously has been most gratifying. Equally so, and possibly a little surprising, has been the active assistance of both bench and bar, and we would like to thank in particular Lords Birkett and Denning, Devlin J., Sir Hartley Shawcross, Q.C., Messrs. Gerald Gardiner, Q.C., C. P. Harvey, Q.C., and Walter Raeburn, Q.C., who have all contributed to our columns. It is our authors who have gained for the *Review* such reputation as it has achieved, and we take advantage of this opportunity to thank them, both on our own behalf and on behalf of our readers. Finally we must thank our subscribers, whose number has steadily grown over the years and on whose support we rely for the future development and prosperity of the *Review*.

C.

THE SOUTH AFRICAN APPEAL COURT AND JUDICIAL REVIEW

In a previous article the present writer examined the radical transformation brought about in the South African Senate as result of the recent constitutional crisis.[1] The purpose of the present paper is to study the effect of this " constitutional revolution " on the composition and status of the South African appeal court and on its power of judicial review of legislative acts. The latter was one of the main points of contention during the crisis. For a proper study of these matters the history of the appeal court since Union in 1910 is considered relevant.

I. Earlier History

The South Africa Act, 1909, which created the Union brought into being an Appellate Division consisting of a Chief Justice, two ordinary Judges of Appeal and two additional Judges of Appeal. The two additional judges were to be assigned from the lower branches of the Supreme Court, *viz.*, the provincial and local divisions [2]; they were not permanent members of the Appellate Division, and when their attendance was not required in that court, were to continue to perform their duties in their respective Divisions.[3] All judges were to be appointed by the Governor-General-in-Council. In practice and by convention this has always meant appointment by the Cabinet [4] on the recommendation of the Minister of Justice, following the comparable British practice. Security of tenure and of salary of judges was provided for after the model of the Act of Settlement, 1700.[5] The Appellate Court

1 (1957) 20 M.L.R. 549–565.

2 Original s. 96 of the S.A. Act.

3 *Ibid.*

4 The Governor-General-in-Council is defined as the Governor-General acting with the advice of the Executive Council (S.A. Act, s. 13). The Executive Council consists of Ministers of State (who in South Africa are all members of the Cabinet) and any other members chosen, summoned and sworn by the Governor-General—all of whom hold office at the Governor-General's pleasure (ss. 12 and 14). In practice only Ministers of State are made Executive Councillors, but they are never dismissed, nor do they retire from the Council. Accordingly, ex-Ministers are members of the Council, but by convention they are never summoned and the Governor-General-in-Council consists of the Governor-General acting on the advice of his Cabinet Ministers of the day. See May, *The South African Constitution* (3rd ed.), p. 182; Verloren van Themaat, *Staatsreg*, p. 258. The system appears to be a pale analogy of the distinction in the United Kingdom between the formal and legal Privy Council on the one hand and the active and extra-legal Cabinet on the other hand.

5 Under s. 101 of the S.A. Act judges are removable only on an address from both Houses of Parliament praying for such removal on the ground of misbehaviour or incapacity. S. 100 lays down that their salaries shall be

would hear appeals in civil cases on matters of law as well as of fact, but in criminal cases heard in a provincial or local division appeals lay on questions of law only, or on some alleged irregularity or illegality in the proceedings.[6] In the hearing of an appeal from a court consisting of two or more judges, the quorum of judges prescribed for the Appellate Division was five and in an appeal from a single judge, the quorum was three. No judge was permitted to sit in an appeal from a judgment in a case in which he had sat in the lower court.[7]

The new Appellate Division was to take the place of the Judicial Committee of the Privy Council *vis-à-vis* the provincial and local Supreme Courts, and accordingly the South Africa Act put an end to appeals as of right to the Privy Council from the superior courts of the Union.[8] The Act, however, specifically saved the appeal as of grace, that is, the right of a citizen to request the King-in-Council for special leave to appeal from a judgment of the Appellate Division.[9] At the same time the South African Parliament was given express power to *limit* such appeals, provided that a Bill doing so must be reserved by the Governor-General for the King's assent.[10]

For the first forty years of Union, few serious changes were made in relation to the Appellate Division. In 1920 all judges of the Appeal Court were made full-time judges of that court, and henceforth the four judges, other than the Chief Justice, were to be designated as Judges of Appeal.[11] The quorum of five laid down for appeals in cases from two or more judges caused some difficulty, should one of the appeal judges be ill or unavoidably absent.[12] In 1927, therefore, a Bill was introduced at the suggestion of the judges of the Appeal Court to reduce the quorum in such cases to

prescribed by Parliament and shall not be diminished during their continuance in office. No judge has ever been removed in South Africa. May, *op. cit.*, p. 247.

6 The position as regards criminal appeals was stabilised by the Criminal Procedure and Evidence Act, 31 of 1917, ss. 369–372. For a fuller statement of the position, see the *Report of the Penal and Prison Reform Commission* (U.G. 47 of 1947), pp. 84 *et seq.*, and Kennedy and Schlosberg, *The Law and Custom of the S.A. Constitution*, pp. 358–359. There was also at that time no appeal against the sentence imposed by the lower court.

7 Original s. 110 of S.A. Act.

8 Kennedy and Schlosberg, *op. cit.*, pp. 375–376. In the case of matters under the Colonial Courts of Admiralty Act, 1890, the appeal as of right to the Privy Council would still be possible after an appeal had been heard by the Appellate Division (S.A. Act, s. 106).

9 S.A. Act, s. 106.

10 *Ibid.* This was a power conferred on the South African Parliament by the United Kingdom Parliament (S.A. Act); Kennedy and Schlosberg, *op. cit.*, therefore assume wrongly that on the basis of *Nadan* v. *The King* [1926] A.C. 491 the Union Parliament could not before the Statute of Westminster, 1931, restrict the right to ask for special leave. See also May, *op. cit*, p. 249. The power given in s. 106 was, however, to "*limit*" appeals and this might have precluded complete abolition of such right of appeal before 1931.

11 Appellate Division Act, 12 of 1920.

12 Acting judges could be appointed under s. 97 of the S.A. Act, but this often involved delay.

four. Objections were raised in Parliament to having an even number in a quorum, and it was suggested that a sixth judge be appointed and the quorum of five retained [13]; others wanted a quorum of three.[14] But the government of the day was for reasons of economy opposed to the appointment of a sixth judge, and in the end the quorum of four was adopted by Parliament with a proviso that if the court was equally divided the judgment of the court *a quo* would stand as the judgment of the Appellate Division.[15] For appeals from cases heard by a single judge as well as certain special types of appeal [16] the quorum remained three as before.

As regards appeals to the Privy Council, these were never many in actual practice, partly because of the expense and delay involved, but mainly because the Judicial Committee itself had imposed a self-denying ordinance in the matter of appeals from the overseas possessions of the Crown.[17] It had declared that it would give leave to appeal only in matters of dominant public importance or of a very substantial character,[18] or involving far-reaching questions of law.[19] In the case of South Africa, moreover, the Judicial Committee showed particular reluctance to entertain appeals on the ground that the United Kingdom Parliament in giving express power to the Union Parliament to restrict appeals to the Privy Council [20] had clearly indicated that the South African courts should

[13] This was at the request of the Johannesburg Bar. See *Assembly Debates*, 1927, col. 204.

[14] See speech of Mr. Robinson, *ibid.*, col. 169.

[15] Administration of Justice Amendment Act, 11 of 1927. The history of this Act in Parliament is of some interest. After encountering opposition to the proposal for a quorum of four, the Government during the Assembly debate agreed to retain the *status quo*. However, the Senate, in which the Government had a minority, restored the Government's original proposal, and in the end it was adopted by the House of Assembly. See *Assembly Debates*, 1927, cols. 1520 *et seq.* Provision was also made in the Act for the case where a judge who had sat in the appeal died or became incapable of continuing.

[16] For example, in criminal appeals and appeals from the Natal Native High Court: Act 11 of 1927, s. 2.

[17] Even before Union the number of appeals had been small. Thus Rose-Innes and Solomon (then judges in the Transvaal) in a memorandum to Sir Henry de Villiers dated Nov. 30, 1908, drafted for purposes of the National Convention, pointed out that there had been only five appeals in the past six-and-a-half years from the Transvaal Supreme Court to the Privy Council. They stated that statistics for the other pre-Union colonies were not available. The writer is indebted to Professor L. M. Thompson for this information.

[18] See *Prince* v. *Gagnon* (1882) 8 App.Cas. 103, at p. 105.

[19] See *Albright* v. *Hydro-Electric Power Commission* [1923] A.C. 167. In this Canadian application the Board refused leave in a matter involving the construction of the terms of a contract, although a large sum of money was involved.

In criminal cases, appeals would only be considered, if by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial injustice had been done. See *Ex p. Carew* [1897] A.C. 719 amongst many cases, and *R.* v. *Kalogeropoulos*, 1945 A.D. 38.

[20] S. 106 of S.A. Act.

dispose of their own appeals.[21] A further consideration that seemed to influence the Judicial Committee was the fact that the South African Constitution was unitary in character, and therefore presumably did not need an outside arbiter on constitutional matters to the same extent that federal constitutions did.[22]

The existence of the appeal was a source of irritation to members of the Nationalist Party, and others, who regarded it as a symbol of colonial subordination to the United Kingdom,[23] and generally speaking also, the Appellate Division's work and reputation were of such a high standard, that it came to be accepted in practice as the final court of appeal in the Union. Appeals to the Privy Council became increasingly infrequent.[24] In 1934, therefore, when leave to appeal was granted by the Privy Council in an ordinary matter, *viz.*, the question of penalties in contract,[25] considerable criticism was provoked in South Africa,[26] and in some circles a spasmodic agitation for abolishing the appeal to the Privy Council was re-kindled[27] culminating in the introduction of a Private

[21] *Whittaker* v. *Durban Corporation* (1920) 36 T.L.R. 784; 126 L.T. 104. In this case special leave to appeal was refused in a matter that was described as "raising essentially a local question."

[22] See *Hull* v. *McKenna* [1926] I.R. 402. On the whole question of appeals to the Privy Council see Latham in *Survey of British Commonwealth Affairs*, Vol. I, pp. 550–554; Wheare, *The Statute of Westminster and Dominion Status* (5th ed.), pp. 96–98.

[23] See Wheare, *op. cit.*, pp. 87 *et seq.* for a discussion of this view. At about the time of the Imperial Conference, 1926, Mr. C. R. Swart (then a backbencher, lately Minister of Justice) moved in the House of Assembly for abolition of appeals to the Privy Council, but the then Minister of Justice (Tielman Roos) resisted this on the ground that the whole matter was pending before the Conference on Dominion Legislation appointed by the Imperial Conference of 1926. (*Assembly Debates*, 1927, cols. 44–45, 202 during debate on Act 11 of 1927 (see n. 15, *supra*).)

[24] For the years 1910 to 1922, the writer has found six appeals from the A.D. in the Appeal Cases reports, but thereafter none till 1934. It has not been possible to check whether there were also unreported appeals. There are a few cases in which the A.D. granted stay of execution of judgment pending appeal to the Privy Council, but actual appeals do not appear to have followed. See *De Villiers* v. *Incorporated Law Society*, 1921 A.D. 600; *Ex p. Hendrickz*, 1934 A.D. 550.

[25] *Pearl Assurance Co.* v. *Union Government* [1934] A.C. 570; 1934 A.D. 560.

[26] A question was asked about the appeal in the House of Assembly in 1934, but the Minister of Justice (Gen. Smuts) declined to answer on the ground that the appeal was still pending (see *Assembly Debates*, 1935, col. 2089). In a debate in 1935 Gen. Smuts described the appeal as a departure from policy and a change of front by the Judicial Committee: *Assembly Debates*, 1935, col. 2089.

[27] In 1935 during a debate on the General Law Amendment Bill, Mr. Swart once again raised the issue and introduced a motion to incorporate in the Bill a section abolishing the appeal (*Assembly Debates*, 1935, cols. 2088 *et seq.*). Gen. Smuts (Min. of Justice) stated that the said Bill was not the place for such a provision (col. 2094), but that consideration would be given to the matter. In 1936 Mr. Swart addressed a question to the Government whether it would introduce legislation to abolish the appeal. Gen. Smuts, while stating that he regarded it as an unsatisfactory form of appeal, was not prepared to introduce legislation, as he considered it to be a constitutional issue which would require considerable public support: *Assembly Debates*, 1937, col. 249.

Member's Bill in 1937,[28] which, however, did not get very far. It was not until 1950,[29] two years after the present Nationalist Government had been returned, that the appeal was finally ended[30]; at this stage there was little opposition to the measure.[31] The Appellate Division thus became in law what it had virtually always been in practice, the final court of appeal for all cases heard in the first instance in the Union.[32] Coming as it did at this juncture, the abolition of the appeal had little effect on the importance and status of the Appellate Division, except that in the conflict with the Government that was to follow that court became the centre of the attack rather than the Privy Council. One noteworthy side-effect was that, in 1954, the Appellate Division declared that as final court of appeal it had the power of departing from an erroneous

[28] Wheare, *op. cit.*, p. 254. The Bill was introduced by Mr. Swart and although it received some support from Government members, the Government for the reason stated by Gen. Smuts in the previous note refused to act on the Private Bill: *Assembly Debates*, 1937, cols. 225–228.

During the debate it was stated by Colonel Reitz, then Min. of Agriculture, that there had been only three appeals to the Privy Council to date since Union (*Assembly Debates*, 1937, col. 226; see also Wheare, *op. cit.*, p. 97, n. 2). In 1950 the Minister of Justice put the number at ten (*Senate Debates*, 1950, col. 728), which seems much nearer the mark. See n. 24, *supra*.

[29] The reaction in South Africa might have had some influence on the Judicial Committee. In 1938 it is reported to have refused leave to appeal in the case of *Arderne, Thesen & Co.* v. *Cape Provincial Administration*, 1937 A.D. 429 (see *Assembly Debates*, 1950, col. 926). Only one appeal has been found reported after 1934 to date in the *Appeal Cases* and *All England Reports*, and that was a Rhodesian case, *Liquidator Rhodesia Metals, Ltd.* v. *Commissioner of Taxes* [1940] A.C. 774. The A.D. granted stay of execution pending appeal to the Privy Council in *Min. of Interior* v. *Bechler*, 1948 (3) S.A. 456, but no actual appeal was found reported. See also *R.* v. *Milne and Erleigh*, 1951 (1) S.A. 791, at pp. 880–882, where the A.D. refused stay of execution on the ground that it was not a case in which the P.C. would have granted special leave to appeal. Similarly, *R.* v. *Lee*, 1949 (1) S.A. 1134, at p. 1149; *Fismer* v. *Thornton*, 1929 A.D. 17; *R.* v. *Kassim*, 1951 (1) S.A. 384 (A.D.).

[30] Privy Council Appeals Act, 16 of 1950. The Bill was introduced by Mr. C. R. Swart as Minister of Justice.

[31] The second reading was passed with two votes against from Native representatives who favoured retention of the appeal because of the impending dispute on the entrenched clauses. See particularly speech of Senator Brookes, *Senate Debates*, 1950, cols. 709–710. The Act was passed in accordance with the terms of s. 106 of the S.A. Act and the consent of the King was obtained. See *Senate Debates*, 1950, cols. 668–669.

[32] The Appellate Division at Union also took the place of the Cape Supreme Court regarding appeals from the High Court of Southern Rhodesia (s. 103 of S.A. Act, later replaced by Rhodesia Appeals Act, 18 of 1931). Such appeals were not affected by the Privy Council Appeals Act, 1950. The S. Rhodesian provisions regarding appeals to the Privy Council were similar to those of s. 106 of the S.A. Act (Statute Law of S. Rhodesia, Ch. 10). As from July 1, 1955, however, appeals from Southern Rhodesia must be taken to the newly constituted Federal Supreme Court of Rhodesia and Nyasaland, and no longer to the Appellate Division in South Africa. The last reported appeal to the A.D. was heard on October 31, 1955: *Estate Sanua* v. *The Master, High Court (S.R.)*, 1956 (1) S.A. 158 (A.D.) Appeals from the Federal Supreme Court to the Privy Council are now regulated by the Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953, but with regard to appeals from S. Rhodesia no change has been made (see Halsbury, *Laws of England* (3rd ed.), Vol. 5, p. 685).

decision of the Privy Council [33] where previously it might have been bound in law.[34] The court will, however, exercise the power with circumspection, and decisions of the Privy Council will still be regarded with the very greatest respect and will have very great persuasive force.[35]

Apart from such increases as are caused by a growing population, an expanding economy, and more and more legislation, there was not any extraordinary enlargement of the work and jurisdiction of the Appellate Division until 1948, and no increase in the number of judges took place. In 1948, however, the passage of the Criminal Procedure Amendment Act, 37 of 1948, conferred on the Appeal Court the function of a Court of Criminal Appeal by permitting appeals (after leave) on questions of fact in criminal cases—a reform which had long been overdue,[36] and which had been strongly recommended by the Penal and Prison Reform Commission of 1947,[37] as well as all branches of the legal profession. To assist the Appellate Division to cope with the added amount of work, it was provided in the Act that the number of judges of the court shall be in the discretion of the Governor-General.[38] It was announced by the Minister of Justice, however, that after consultation with the Chief Justice it had been decided that the appointment of one additional judge would be sufficient.[39] With

[33] *John Bell & Co., Ltd.* v. *Esselen*, 1954 (1) S.A. 147 (A.D.) at p. 154. It is interesting to note that at the instance of the Opposition during the debate on the Privy Council Appeals Act, the Minister of Justice moved an amendment to the effect that the A.D. need no longer take cognisance of Privy Council decisions (*Assembly Debates*, 1950, cols. 972–973). The amendment was, however, rejected in the Senate (*Senate Debates*, 1950, col. 748) and the clause was dropped.

[34] The Appellate Division had previously considered itself bound to follow the Privy Council on questions of Roman-Dutch law and on questions of interpretations of statute even where the decision was given in an appeal from non-South African courts. See R. S. Welsh (1950) 67 S.A.L.J., pp. 227–230. The decision which the Appellate Division refused to follow in *John Bell's* case was *John* v. *Dodwell and Co., Ltd.* [1918] A.C. 563, an appeal from Ceylon.

[35] *Per* Centlivres C.J. in *John Bell's* case, at p. 154. Thus in 1953 the Appellate Division had followed the decision of the Privy Council in the *Pearl Assurance* case (*vide supra*, n. 25), despite the fact that that decision had gone contrary to the Appellate Division's own decision in that case. See *Tobacco Manufacturers Committee* v. *Jacob Green and Sons*, 1953 (3) S.A. 480 (A.D.) Van den Heever, J.A., in his judgment in the *Tobacco* case strongly criticised the *Pearl Assurance* decision of the Privy Council as being contrary to Roman-Dutch law, but followed it reluctantly (at pp. 492–493).

[36] Indeed, in 1935, when the General Law Amendment Bill was sent to a Select Committee of the Assembly, that committee inserted some sections providing for such appeals in criminal cases. Although there was a considerable body of opinion in favour of these provisions, the Minister of Justice (Gen. Smuts) dropped the clauses on the ground of the increased load that would be thrown on the judicial machinery. He promised further consideration of the matter in a separate Bill. See *Assembly Debates*, 1935, cols. 1727, 1955–56; *Report of the Penal and Prison Reform Commission*, 1947, pp. 83–84.

[37] *Penal Report*, pp. 84–85.

[38] Act 37 of 1948, s. 1, amending s. 96 of the S.A. Act which had provided for a Chief Justice and four judges of appeal.

[39] *Assembly Debates*, 1948, col. 95. The Act relieved the Appellate Division of criminal appeals from the Natal Native High Court. Such appeals were

such a sixth judge, it would also become possible for the Appellate Division to sit in two divisions to deal with appeals in which the quorum required was three, and thus to dispose of its work much more expeditiously.[40] For several years thereafter the Appellate Division carried on with six judges sitting in two divisions where necessary and possible, but as often also in one division of five judges.[41] No request was made from any source for the appointment of more judges of appeals,[42] even though after 1948 there was a considerable increase in the scope of the Appellate Division's duties.[43] It was really the subsequent decision of the Appellate Division in the *Vote* case [44] on the binding force of the entrenched clauses of the South Africa Act, and the Government's dislike of that decision, which eventually led to a large-scale change in the composition and status of the Appellate Division.[45]

II. Judicial Review

The nature and merits of the judgment in the *Vote* case and of certain ancillary doctrines such as parliamentary sovereignty have been sufficiently argued [46] to dispense with discussion here, but

now to be made to the Natal Provincial Division except in the case of death sentences when the appeal was direct to the Appellate Division. There was a further appeal from the N.P.D. to the A.D. (ss. 3 and 6).

40 *Assembly Debates*, 1948, cols. 95–96.

41 For example, in 1953 out of 65 reported appeals 33 were heard by three judges, and 32 by five judges. In 1954 the figures were 28 and 39 respectively, in 1955 they were 39 and 36 respectively.

42 In the debate on the Appellate Division Quorum Bill, 1955, the then leader of the Opposition (Mr. Strauss) stated that the work of the Appellate Division was not in arrear to the slightest extent, and that the Chief Justice had not asked for additional judges nor had he been consulted about enlarging the Appellate Division: *Assembly Debates*, 1955, col. 4438. This statement was never contradicted by the Government.

43 Criminal appeals increased appreciably. According to figures kindly supplied by the Registrar of the A.D. there were 34 in 1946, 29 in 1947, 49 in 1948, 59 in 1951, 78 in 1952, 79 in 1953 and 88 in 1954. These figures represent only the actual appeals heard in criminal cases, and do not include applications for special leave to appeal which may be made to a single Judge of Appeal where leave is refused by the court *a quo*. In addition, by Act 13 of 1954 the Natal Native High Court was abolished and its jurisdiction transferred to the Natal Provincial Division. All appeals therefore went direct from the N.P.D. to the A.D., thus eliminating the N.P.D. as an intermediate appeal court. See n. 39, *supra*.

44 *Harris* v. *Minister of the Interior*, 1952 (2) S.A. 428 (A.D.).

45 See III below.

46 Generally in support of the judgment see C. P. Joubert, "Die Gebondenheid van die Soewereine Wetgewer aan die Reg," in (1952) 15 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, pp. 7–59; Beinart, "Sovereignty and the Law," *ibid.*, pp. 101–134; Cowen, "Legislature and Judiciary" in (1952) 15 M.L.R. pp. 282–296 and (1953) 16 *ibid.*, pp. 273–298; Wheare, *Statute of Westminster* (5th ed.), App. VIII; Kahn, *Annual Survey of S.A. Law*, 1952, pp. 1–28; Griswold, (1952) 65 *Harvard Law Review*, pp. 1360 *et seq.*; D. I. le Roux, (1955) 18 *Tydskrif*, pp. 284–298. *Contra* H. Verloren van Themaat, (1953) 16 *Tydskrif*, pp. 57–90; J. P. Verloren van Themaat, *Staatsreg*, pp. 442 *et seq.*; McWhinney (1952) 30 *Canadian Bar Review*, pp. 712 *et seq.*, though the latter maintains that the court may have succeeded in creating fundamental law for the Union. For a chronicle of the events involved in the *Vote* case see May, *op. cit.*, pp. 50 *et seq.*; Kahn, *loc. cit.*

incidental to, and implicit in, that decision was the acceptance of the power of judicial review of Acts of the South African Parliament. This, usually described as the *testing right* in South Africa, has not received quite the same attention from legal writers, and will be considered here, particularly as it was much bandied about during the constitutional crisis, and has been affected by the legislation following on the enlargement of the Senate and of the Appeal Court.[47] In a previous paper, the present writer has emphasised that the question of the testing right is one of jurisdiction and should not be confused with questions of substantive law flowing from the theories of parliamentary sovereignty, parliamentary privilege, *et alia*.[48]

The existence of a testing right has been strenuously denied by some both before and after the *Vote* case on various grounds which have not always been kept distinct nor clearly formulated.[49] But this power had been exercised by the South African courts on a previous occasion[50] and the gravamen of the criticisms is really that the court had lost such power after the enactment of the Statute of Westminster,[51] not only as result of the achievement of

[47] South Africa Amendment Act, 9 of 1956. See III below.

[48] "Parliament and the Courts" in *Butterworths S.A. Law Review*, 1954, p. 135. In this paper the writer attempted to cover all aspects of judicial review in the United Kingdom and in South Africa, and he must be forgiven frequent reference to it in the present article.

[49] The nature and limits of these grounds are examined in "Parliament and the Courts."

[50] *R.* v. *Ndobe*, 1930 A.D. 484.

[51] One of the grounds on which the testing right has been denied had nothing to do with the changes brought about by the Statute of Westminster and could not be affected by it. Thus, for example, in 1920 when there was some doubt as to the exact date of dissolution of the first Senate of the Union which had been constituted for ten years by s. 24 of the S.A. Act, a Bill was introduced to settle this date. But as s. 24 could not be altered by Parliament before expiration of the ten years (s. 152), it was argued that the Act would be held invalid by the courts. The President of the Senate ruled that no court in the Union had any right to pronounce on the matter even if the Senate had been wrongly constituted, and that Parliament alone had the right to decide on the validity of the legislation. The main reason given for his ruling was that the S.A. Act did not expressly constitute the courts as the authority to interpret the Constitution (see, however, n. 63, *infra*). The Speaker of the Assembly had given a similar ruling (see typewritten reports of *Senate Debates*, 1920, Vol. I, pp. 203–204). At this stage there was no claim that the S.A. Parliament was sovereign, or that it was an exact replica of the British Parliament, nor was the efficacy of s. 152 doubted. The ruling could therefore only have been due to the influence of Continental doctrine referred to in the text (see n. 55, *infra*).

This Bill, which became the Constitution of the Senate Act, 9 of 1920, was never challenged in the courts. The doubt was whether the Senate expired ten years after the date of the coming into force of the S.A. Act (May 31) or after the date of the coming into being of the first Senate (October 31). The Act declared October 31 to be the date, and this legislation seemed to be within the terms of s. 152. As Gen. Smuts pointed out in the debate, if October 31 was the correct date then the law had not been altered. If May 31 was the correct date, then the ten-year period had elapsed and the legislation was competent in terms of s. 152 (see reports mentioned in this note, pp. 204–206).

sovereignty,[52] but also on the assumption that the South African Parliament became an exact replica of the British Parliament as regards its essential composition [53] and attributes.[54] The argument was, however, also considerably flavoured with the doctrine found in some Continental countries that the constitution is a matter of public law, a matter of political agreement, from which the judiciary is excluded altogether.[55] Unfortunately in the *Vote* case the Appellate Division did not deal fully with the question of the testing right, contenting itself with relying on *R.* v. *Ndobe* [56] and saying that the court was competent to inquire whether an Act of Parliament has been validly passed. "To hold otherwise would

[52] This was the main standpoint of the court in *Ndlwana* v. *Hofmeyr*, 1937 A.D. 229, which denied jurisdiction on this ground, coupled in a rather confused way with the enrolled Bill rule. On these points the judgment was overruled in the *Vote* case. See "Parliament and the Courts." The Government had, however, taken its stand on *Ndlwana's* case and continued to do so after the *Vote* case.

[53] This assumption was described as a fallacy in the *Vote* case, at p. 464.

[54] For example, that Parliament is the Highest Court of the Realm and that this fact excluded the jurisdiction of the courts. This argument is dealt with in "Parliament and the Courts," pp. 154–157. More recently Prof. J. P. Verloren van Themaat in his textbook, *Staatsreg*, pp. 459–461 has reasserted this view that the S.A. Parliament, like the U.K. Parliament, is still such a High Court. He relies particularly on the case of *Tole* v. *Director of Prisons*, 1914 T.P.D. 20, which has been overlooked by other writers. In this case actions were brought for damages for, and release from, imprisonment, imposed during a period of martial law in South Africa. At the time an Indemnity Bill was pending before Parliament. Wessels J. stated that the matters before him were "*sub judice* before the highest court of this land, that is, our Parliament . . . If Parliament passes an Act of Indemnity and deals with these matters . . . any order we might make today would be futile and the court would have unnecessarily expressed an academic opinion" (at p. 23). Later: "I think it would be improper on our part to deal with the matter today, *even though we have power to do so*" (italics supplied). He postponed the applications *sine die*. Mason J. agreed but held that those in custody should be released on bail; he did not mention the words "High Court." Bristowe J. said the court had a discretion whether it would exercise its powers or whether it would stay its hand, describing postponement "as a matter of courtesy from a lower to a higher tribunal" (at p. 26). There is, however, nothing in this case to indicate that the jurisdiction of the courts would be excluded. It is a class of case in which, as pointed out by the present writer in "Parliament and the Courts" (pp. 140–142), it would for reasons of public policy be improper for a court to prejudice what is being done in Parliament. A question of jurisdiction is not involved, and the fact that two of the judges referred to Parliament as a High Court or a superior tribunal is just a courteous and traditional, though anachronistic, form of speech (see "Parliament and the Courts," pp. 156–157). Indeed, the court declared that it had jurisdiction but would for the sake of courtesy and expediency postpone the actions. In an earlier similar case, *The Queen* v. *Bekker* (1900) 17 S.C. at p. 357, Solomon J. stated the law more correctly and more circumspectly: "To the authority of an Act of Parliament the court must of course submit without question; but in my opinion nothing less than an Act of Parliament can take away from the Supreme Court the right or relieve it of its duty to decide whether an act is justifiable or not," though admitting that "It was right and proper that the court should stay its hand for the present pending the decision of Parliament upon this question" (at p. 362).

[55] See, for example, Mr. Froneman, *Joint Sitting Debates*, 1956, cols. 320–322, and n. 51, *supra*. This aspect is also dealt with in "Parliament and the Courts," pp. 157–164, and Cowen (1953) 16 M.L.R., pp. 283–284.

[56] 1930 A.D. 484.

mean that courts of law would be powerless to protect the rights of individuals which were specially protected in the Constitution of this country." [57] In the *High Court* case this assumption was, however, elaborated to a greater extent.[58]

The first serious threat to the position of the Appellate Division and the testing right came with the High Court of Parliament Act, 35 of 1952. The Government, unwilling to accept the decision in the *Vote* case as the final word, passed with simple majorities in each House an Act creating a High Court of Parliament, of which every member of the Assembly and of the Senate was to be a member. This "High Court" was declared to be a court of law by the Act and was given power to review any judgment of the Appellate Division which had declared invalid any Act of Parliament. The case for review would first be heard by a judicial committee consisting of ten members which would report to the full "High Court." [59] This High Court proceeded to review the decision in the *Vote* case. Only Government members of Parliament attended the sitting of the judicial committee [60] and the High Court of Parliament; Opposition members boycotted the proceedings, and there was no appearance by or on behalf of the Coloured voters. The High Court of Parliament ruled that the entrenched sections of the South Africa Act were no longer binding and that the decision of the Appellate Division in the *Vote* case was wrong. In the meantime the validity of the High Court of Parliament Act had been challenged in the courts. The Cape Provincial Division unanimously held the Act to be invalid, and this decision was affirmed by the Appellate Division.[61] Each of the five Judges of Appeal gave a separate judgment leading to the same result along paths which were not very divergent. All five stated as a first proposition that the testing right of the courts was implicit in the South African Constitution unless otherwise provided in terms of the Constitution, elaborating more fully on this point than was done in the *Vote* case. Thus Centlivres C.J.: "A Constitution might provide for an entrenchment which cannot be enforced by courts of law (*e.g.*, the Swiss Constitution, see Bryce's *American Commonwealth* (3rd ed.) p. 260) but this is not what our Constitution prescribes. In our Constitution the entrenchment is effected by applying the sanction which can only be applied by courts of law." [62] And again: "There can to my mind be no doubt that the authors of the Constitution intended that those rights should be enforceable by courts of law. They could never have intended

[57] At p. 470.
[58] *Vide infra.*
[59] For a fuller description of the details of the High Court of Parliament and its proceedings see May, *op. cit.*, pp. 57–60; Kahn, *Annual Survey of S.A. Law*, 1952, pp. 9–14. For the political events attendant thereon see May, *op. cit.*, pp. 61–62.
[60] Four Opposition members had been nominated to this committee.
[61] *Minister of the Interior* v. *Harris*, 1952 (4) S.A. 769 (A.D.).
[62] At p. 780, thus rightly rejecting the argument based on Continental example.

to confer a right without a remedy."[63] As a second proposition, it followed from this that as the testing right was also implicit in the entrenched sections, such implied jurisdiction could only be removed or impaired in conformity with those clauses; in other words, that the testing right of the courts is itself entrenched as a judicial safeguard in all matters falling within the scope of the entrenched clauses. In terms of those clauses the testing right of the courts could only be excluded or transferred to another body by both Houses of Parliament sitting together and passing an Act with a two-thirds majority of its members as required by the clauses. At the same time, all five judges conceded as a third proposition that Parliament, sitting bicamerally, may, in terms of the powers given it by the South Africa Act to legislate with regard to the courts, amend the constitution of the judiciary which is to pronounce on the validity and applicability of the entrenched sections, subject, however, to the limitation which follows by necessary inference from the second proposition that "it must be a court."[64]

It was agreed by all the judges that the High Court of Parliament as constituted was not by any standards such a court as was intended by the Constitution. It was simply Parliament functioning under another name or under a thin disguise, and it had none of the characteristics of the type of court envisaged.[65]

[63] At pp. 780–781. See in similar terms Schreiner J.A., at p. 787, and Hoexter J.A., at p. 794. "Parliament and the Courts," p. 164. In that article it was argued by me that in British orientated constitutions, the courts always are by implication the arbiters of the constitution, unless they are expressly excluded in terms of the Constitution (see pp. 160–163).

[64] *Per* Van den Heever J.A. at p. 792. With regard to matters relating to those parts of the constitution which fall outside the scope of the entrenched clauses, presumably Parliament sitting bicamerally may alter the nature of the courts as it pleases and even abolish them, or substitute a High Court of Parliament (thus Schreiner J.A. in the *Senate Act* case (*Collins* v. *Minister of the Interior*, 1957 (1) S.A. 562 (A.D.)), at pp. 580–581). It would also seem to follow that Parliament sitting unicamerally in terms of the entrenched clauses cannot remove the judicial safeguard with respect to matters which require bicameral assembly. See Beinart, *Tydskrif*, Vol. 15 (1952), p. 119, where it is contended that the bicameral process is imperative in matters falling outside the entrenched sections; and see III, below. Parliament acting in terms of the entrenched clauses may, however, alter the nature of the courts or eliminate them with respect to questions arising under these clauses. This was done by the S.A. Amendment Act of 1956, s. 2 (see III *infra*).

[65] Thus Van den Heever J.A. at p. 793: "Where . . . the constituent individuals of that legislative body functioning in a different manner are appointed as a final Court of Appeal to determine whether they had acted lawfully or otherwise, their newly-acquired capacity and functions cannot by any standard be said to be judicial." Certain subsidiary grounds were mentioned by some of the judges such as that the Act gave to the Government only, and not to the individual affected, a right to appeal to the "High Court," and thus deprived the individual of the testing right (*per* Centlivres C.J. and Hoexter J.A.), and further that it only allowed an appeal where a statute had been declared invalid by the Appellate Division, not where it had been declared valid (*per* Greenberg J.A.). But even if these provisions had not been included in the High Court Act, it is submitted the Act would still have been invalid. They assist, but do not derogate

Several of the judges also expressed opinions as to the type of court contemplated by the Constitution. Strictly speaking, these opinions were *obiter* and furthermore there was no general agreement amongst them.[66] In an attempt to sum up the general trend of the different opinions the present writer has submitted that the least type of court envisaged for the purpose of constitutional review under the South African Constitution was a court with legally qualified judges of standing, unbiased and manifestly without interest in the matter before them, secure of tenure and of salary,[67] free to decide the law and manifestly likely to do so, to which court access by aggrieved persons would be freely permitted.[68]

The *High Court* case, therefore, not only strongly reaffirmed the testing right of the courts but treated it as an additional, if not the only adequate, protection of the rights safeguarded by the Constitution.[69]

III. Recent Legislation and its Aftermath

The first step in reply to the *High Court* judgment came after the general election of April, 1953, which had failed to give the Government the two-thirds majority required for purposes of the

from, the central proposition set out in the text above. Indeed, this point was emphasised by Schreiner J.A. in his dissenting opinion in the *Senate Act* case, at p. 581.

A wider ground, not relevant here, for invalidating the High Court Act seems to have been stated by Centlivres C.J. at p. 780, *viz.*, that the entrenched sections guaranteed certain rights, and Parliament acting bicamerally could not pass any Act the effect of which would be to render nugatory the rights entrenched in the Constitution. See Kahn, *Annual Survey of S.A. Law*, 1952, p. 15; Van Themaat, *Staatsreg*, p. 461. This point, however, received short shrift from Centlivres C.J. in the *Senate Act* case (see pp. 568–569 of that report), though it was approved by Schreiner J.A. who regarded it as sufficient that the High Court Act made the constitutional guarantees of the entrenched sections incomparably weaker: "In theory the High Court of Parliament might have upheld the court's decision in the earlier case but there was a substantial degree of improbability that this would happen nor did it" (at p. 580).

66 The opinions are set out in "Parliament and the Courts," at pp. 177–179.

67 As laid down in ss. 100–102 of the S.A. Act.

68 "Parliament and the Courts," p. 180. Schreiner J.A. set his sights rather higher than this. According to him the "protective judicial system implicit in s. 152 . . . is the Supreme Court of South Africa, based as it is on the Supreme Court of the four colonies at the time of Union, with the Appellate Division set up at its apex" (at p. 789). He pointed out that any tribunal to which the title of court could not be denied, would not do, *e.g.*, the magistrate's court of any named S.A. town or city (at p. 788). But such a court in any event does not have security of tenure and of emoluments. Van den Heever J.A., again, set the test much lower. See "Parliament and the Courts," at p. 178; *High Court* case, at p. 792.

69 The correctness of the judgment in the *High Court* case has not been seriously questioned. Prof. van Themaat in *Staatsreg*, pp. 462–463, defends the High Court of Parliament both as a legally valid and morally justifiable institution, mainly on the basis that the S.A. Parliament, like the U.K. Parliament, has always been and still is a High Court which alone can decide the validity of Acts of Parliament to the exclusion of the courts. But if the S.A. Parliament is a High Court, why was it necessary for an Act of Parliament to say so?

entrenched clauses. The Government first convened a joint sitting of both Houses in the hope that with the help of some Opposition members, it might get the necessary number of votes, the Prime Minister, Dr. Malan, appealing for a free vote without party Whips.[70] To this joint sitting the Government submitted a Bill [71] which set out to repeal the clause entrenching the Coloured vote [72] entirely and to revalidate the Separate Representation of Voters Act of 1951 which had been declared invalid by the Appellate Division. The Bill also purported to take away the testing right of the court in certain matters.[73] When this Bill failed to get the requisite two-thirds majority vote, the Government later introduced another Bill [74] which sought to divide the Appellate Division into two sections, a Court of Civil and Criminal Appeal consisting of the Chief Justice and the existing judges of appeal, and a Court of Constitutional Appeal, consisting of a president and four judges, all of whom might be acting judges.[75] The Court of Constitutional Appeal alone would have power to sit in appeals involving the validity of any Act of Parliament or of a Provincial Ordinance.[76] The Bill was accorded a first reading but was not proceeded with. Instead a second joint sitting was convened shortly afterwards to approve a Bill [77] which sought only to remove the Coloured voters from the common roll validating the Separate Representation Act of 1951, but leaving the entrenched sections including section 35 intact.[78] This Bill was referred to a Joint Select Committee, but at the subsequent third reading in 1954 the Bill still failed to obtain the necessary two-thirds majority. The Constitution Court Bill was, however, not revived and May ascribes this to " a remarkable concession to constitutionalism " on the part of Dr. Malan.[79]

There was a change of Prime Minister at the end of 1954, Dr.

[70] See May, *op. cit.*, pp. 68–69.

[71] Entitled the South Africa Act Amendment Bill.

[72] S. 35 of the S.A. Act read with s. 152.

[73] For further details see May, *op. cit.*, pp. 68–69; Kahn, *Annual Survey of S.A. Law*, 1953, pp. 1–2.

[74] Entitled the Appellate Division Bill.

[75] See *Assembly Debates*, 1955, cols. 4439–4440.

[76] For fuller details see Kahn, *Annual Survey of S.A. Law*, 1953, pp. 2–4.

[77] Entitled the Separate Representation of Voters Act Validation and Amendment Bill.

[78] May, *op. cit.*, pp. 68–70. The reason for this second joint sitting was the hope on the part of Dr. Malan that a split in the main Opposition Party, the United Party, would bring him sufficient votes to achieve a two-thirds majority. A dissident group of six members of the United Party, although opposed to changing the Constitution, were prepared to agree to placing the Coloured voters on a separate roll, and actually voted for the Government in this joint sitting, but the total was still nine short of a two-thirds majority. The dissident group later formed itself into a new party, the Conservative Party. See May, *op. cit.*, p. 70; *Joint Sitting Debates*, 1953, p. 25. This party is now extinct, some of its members have crossed over to the Nationalists, others have retired from politics; two sought election as Independents at the 1958 General Election but were not elected.

[79] *Op. cit.*, p. 70.

Malan retiring from political life,[80] and being succeeded by Mr. J. G. Strijdom. During the ensuing session of Parliament the Government decided to increase the number of Judges of Appeal from six to eleven, and acting in terms of the power given by section 1 of the Criminal Procedure Amendment Act of 1948,[81] the Governor-General nominated five new judges to take office on October 1, 1955. Two of these were Judges-President of the Provincial Divisions, and the other three were fairly senior judges.[82] These appointments were followed by the enactment by Parliament, acting bicamerally, of the Appellate Division Quorum Act, 27 of 1955. This Act amended section 110 of the South Africa Act and laid down that in all ordinary appeals the quorum of judges for the Appellate Division would be five [83] and that in cases where the validity of an Act of Parliament [84] was in question, the quorum would be *eleven*. It was further provided that if during the hearing of any appeal the number of judges fell below the quorum through the death, incapacity or retirement of a judge, the appeal should continue before the remaining judges and the judgment of three (in case of a quorum of five) and six (in case of a quorum of eleven) should constitute the judgment of the court.[85] When introducing this Act, the Minister of Justice (Mr. Swart) gave as the main reasons the fact that the existing quorum of four was undesirable in that it might lead to equal division of opinion and thus uphold the decision of the court *a quo*,[86] and that the alternative quorum of three was too small.[87] The motive for the quorum of eleven was stated to be a desire for legal certainty as regards the powers of Parliament caused by the divergence between *Ndlwana* v. *Hofmeyr* and the *Vote* case, and that this could only be achieved by a larger court than that which decided on these matters in the past. The Opposition attacked the measure as an attempt to circumvent the decision in the *Vote* case, and as casting a reflection

[80] The main reason for his retirement was his advanced age, but it appears that it was also a move by him in order to make way for Mr. N. C. Havenga, his own choice as successor. The Nationalist Party caucus, however, elected Mr. Strijdom.

[81] *Vide supra*, I.

[82] Several more senior judges were, however, passed over (May, *op. cit.*, p. 73). In the meantime also Greenberg J.A., who was one of the judges in the *Vote* case and in the *High Court* case, had reached retiring age, his place being taken by Steyn J.A. There were, therefore, six new judges of appeal as compared with the five existing ones.

[83] This provision did away entirely with the previous rule which allowed a quorum of three in certain cases. See I, above.

[84] Act of Parliament is stated to include "any instrument which purports to be and has been assented to by the Governor-General as such an Act" (s. 110 (1) of the S.A. Act as amended by this Act).

[85] In all other cases the appeal would have to start afresh.

[86] See I, above. The present writer has come across very few cases in the Reports where the Appellate Division sat with a panel of four; nearly always the panel was five except in those appeals where a quorum of three was permissible.

[87] *Assembly Debates*, cols. 4425–4427; May, *op. cit.*, pp. 72–73. In the case of the Criminal Procedure Act, 1948, the Minister was not, however, worried about the quorums of four and three. See I, *supra*.

on the existing court. The Act would not do much to expedite the work of the Appellate Division. The court would still be able in ordinary appeals to sit in two sections only, now of five judges instead of three as before, but on the other hand it could now do so in all cases, whereas previously it could only do so in those cases where the quorum was three. There had, however, been no dissatisfaction with the decisions delivered by the former panels of three judges nor had there been any serious complaints about delays in hearing appeals.

The legal validity of the Appellate Division Quorum Act has not been challenged in the courts. The only provision, of course, that could possibly be impugned was the new quorum of eleven, for thereby Parliament had created bicamerally a new entity to declare on the validity of the entrenched clauses. On the basis of the *High Court* case judgments it would have been difficult to find a ground of invalidity, and this was no doubt the consideration which weighed with those who later contested the validity of the legislation that followed in the wake of the Quorum Act. The judges in the *High Court* case had declared that Parliament acting bicamerally could remodel the judiciary for the purpose of interpreting the applicability and validity of the entrenched clauses, as long as in the end result it was still a court. It would have been virtually impossible to contend that the Appellate Division as reformed was not a court in terms of the requirements [88] enunciated by most of the judges. Even the judgment of Schreiner J.A., who stated that the type of court implicit in the entrenched clauses and contemplated by the framers of the Constitution was the existing Supreme Court of South Africa with the Appellate Division set up at the apex, would probably not have availed. Nor could the quorum be attacked on the alternative ground later elaborated by Schreiner J.A. in the *Senate Act* case that there was a substantial degree of probability that the guarantee of the entrenched section was made incomparably weaker.[89] An increase in the existing courts of the number of "judges trained in the law who are outside party politics and have no personal interest in the cases before them," to use Schreiner J.A.'s own words,[90] would appear to be permissible under his rulings. It does, however, appear to the present writer that there is a ground, slightly different from that in the *High Court* case, on which the provision of the quorum of eleven in matters affecting the entrenched clauses might have been regarded as invalid. In the British type of constitution, if the constitution is silent or doubtful on the point, the natural presumption is that the interpretation and application of all law automatically falls within the jurisdiction of the ordinary courts,

[88] For these see II, *supra*.
[89] See n. 65, *supra, in fine*.
[90] *High Court* case, at p. 789.

not of special courts.[91] Accordingly, the protective judicial machinery envisaged under the entrenched clauses is the ordinary courts of the land. The applicability of these clauses must therefore be subject to review by the same courts as those which pronounce on ordinary matters and allows of no differentiation based on subject-matter. A special quorum for matters touching the entrenched clauses different from that required for ordinary cases is impliedly prohibited by the entrenched clauses.[92] The quorum can be increased or diminished and provision can be made for different quorums as long as there is no differentiation based on subject-matter.[93] Only by legislation in terms of section 152, therefore, and not by ordinary bicameral legislation, could a special and separate quorum be established for purposes of adjudicating on matters affected by the entrenched clauses.[94]

The reconstituted Appellate Division, as events turned out, was not asked to reconsider the judgments given in the *Vote* case and in the *High Court* case. The Government, possibly feeling that the Appeal Court would still consider itself bound by the two previous decisions,[95] followed a different course. The Senate was reconstituted in such a way that the Government would at a joint sitting of both Houses of Parliament have a two-thirds majority of the total membership of both Houses.[96] In the following year, the South Africa Amendment Act, 9 of 1956, was passed at such a joint sitting. This Act considerably amended the entrenched clauses and placed the Coloured voters on a separate roll.[97] It

[91] See "Parliament and the Courts," p. 159.

[92] This argument would, of course, have been heard by the Appellate Division as constituted before the Quorum Act, that is, with a quorum of five.

[93] In other words, the quorum could have been made eleven or less for all cases, but not a special quorum for matters involving the entrenched clauses. On similar grounds the Court of Constitutional Appeal contemplated in 1953 would have been illegal for purposes of deciding on the applicability of the entrenched clauses. It is important to note that Schreiner J.A. in the *High Court* case stated that the kind of court contemplated by the entrenched clauses is one whose jurisdiction is general as to subject-matter (at p. 789).

[94] May, *op. cit.*, p. xiii, argues that because of the background and circumstances under which the Quorum Act was introduced, the new judges, and probably the old judges as well, could have been requested to recuse themselves. This point is, in my opinion, without substance. *Cf. R.* v. *Milne and Erleigh*, 1951 (1) S.A. 1 (A.D.).

[95] During the subsequent hearing in the *Senate Act* case before the panel of eleven, counsel for the Government did actually start by questioning the correctness of the decision in the *Vote* case. One of the newly appointed judges then announced that he and some of his colleagues had accepted appointment on the understanding that the two decisions would not be challenged. After consultation with his clients, counsel for the Government abandoned this part of his argument.

[96] Senate Act, 1955. The reconstituted Senate gave the Nationalist Government 77 Senators on its side. (For method of reconstitution, see my article, (1957) 20 M.L.R., at pp. 559–560, especially n. 85.) With this number together with 94 votes in the House of Assembly, the Government could now count on a vote of 171 out of a total of 248 at a joint sitting (Senate 89, Assembly 159). Thus the Government had five more than two-thirds (166). See May, *op. cit.*, pp. 74–75; *Senate Act* case, p. 563.

[97] This Act was substantially a re-enactment of the Bill brought before the first joint sitting in 1953. See n. 71, *supra*.

was the combined effect of these two Acts which was challenged before the courts. The appeal in the case was heard before the Appellate Division sitting with a panel of eleven. In the final outcome, the court ruled by a majority of ten to one (Schreiner J.A. dissenting) that both Acts were not legally precluded by the entrenched clauses. In the ten who decided in favour of such validity there were two judges (Centlivres C.J. and Hoexter J.A.) who had sat in the *Vote* and *High Court* cases, and one (Fagan J.A., now Chief Justice) who was a member of the court at the time but did not sit.[98]

The South Africa Amendment Act of 1956 repealed only the entrenched sections relating to the franchise [99] and left section 137, the clause which entrenched the equality of the two official languages, together with that part of section 152 affecting it, intact. But in eliminating the franchise entrenchment, the Act at the same time attempted to assail the scope of judicial review of statutes. Section 2 states in general terms:

"No court of law shall be competent to enquire into or to pronounce upon the validity of any law *passed by Parliament* [1] other than a law which alters or repeals or purports to alter or repeal the provisions of section 137 or 152 of the South Africa Act, 1909."

This section shows firstly that the Government now recognised and accepted the testing right and its entrenchment, as laid down in the *High Court* case, in the limited sphere of section 137, but it must not be forgotten that this entrenchment has no longer the value it was given in the *High Court* case, because as a result of the *Senate Act* decision Parliament can always circumvent any entrenchment in the South Africa Act by enlarging the Senate or possibly even the Assembly by bicameral Act and thus providing the necessary two-thirds majority. No doubt the Government's further intention in enacting section 2 was to do away with judicial review of statutes in all other respects. As the entrenchment relating to the franchise had already been removed by the Act, the abolition of the testing right in that sphere is really a superfluity, and it may even be asked whether section 2 as it stands achieved much more. Outside of the entrenched clauses the fields in which before the 1956 Act the courts could possibly question an Act of Parliament were those where both Houses had not assented to the Act; where an Act was passed without the necessary quorum or majority; where any constituent element which passed the Act was not properly constituted [2]; where Parliament had

[98] Of the remaining two judges who had sat in the *Vote* and *High Court* cases, Greenberg J.A. had reached the age of retirement, and Van den Heever J.A. died in January, 1956.

[99] S. 35 and parts of s. 152 of the S.A. Act.

[1] Italics supplied.

[2] See Coertze, (1941) 5 *Tydskrif*, p. 51, who points to the fact that the assent to an Act by an improperly appointed Governor-General would invalidate that Act. See also Beinart, (1952) 15 *Tydskrif*, pp. 113–114.

failed to follow the procedures laid down by the South Africa Act [3]; or where Parliament had not observed the manner and form of legislation laid down by Parliament itself.[4] There is, of course, considerable difference of opinion as to whether statutes can be questioned by the courts on any of the grounds stated, but for present purposes it will be assumed that they can.[5]

Now, for matters falling under entrenched section 137, the Act leaves the above points, in so far as they may be applicable, unimpaired. In all other matters requiring bicameral legislation, it may well be argued that the testing right can only be taken away by legislation in bicameral assembly, whereas Act 9 of 1956 which purports to do so was enacted in unicameral assembly. Just as Parliament acting bicamerally could not deprive the entrenched sections of their judicial protection, so Parliament sitting unicamerally cannot remove the judicial safeguard in respect of matters that require bicameral legislation.[6] For this proposition strong reliance can be placed on the judgment in the *Vote* case. Centlivres C.J. said: "It is implicit in that Act [the South Africa Act] that Parliament must function bicamerally save in the cases excepted by sections 35, 63 and 152." [7]

[3] For example, that money Bills must originate in the Assembly and that the Senate may not amend a money Bill (s. 60 of S.A. Act) and similar provisions. See "Parliament and the Courts," pp. 151–152; Kahn, *Annual Survey of S.A. Law*, 1956, p. 16. It is more than likely, however, that such inquiry would be excluded by the enrolled Bill rule. See "Parliament and the Courts," pp. 152 and 176.

[4] See "Parliament and the Courts"; *Tydskrif*, Vol. 15 (1952) pp. 111–134; Jennings, *The Law and the Constitution* (3rd ed.), p. 145; Cowen, (1953) 16 M.L.R., pp. 290 *et seq.*; H. W. R. Wade, 1955, *Cambridge Law Journal*, pp. 173–186. Wade states that the question of the binding nature of such manner and form was squarely before the courts in the *Vauxhall Estates* and *Ellen Street Estates* cases and was answered in the negative. But in the present writer's opinion the legislation in those cases merely placed fetters on the subject-matter or duration of the legislation, and did not deal with manner and form at all. See 15 *Tydskrif*, pp. 128–130.

[5] See nn. 2–4 above.

[6] See n. 64, *supra*.

[7] At p. 463. And again: "Except in the case of Bills dealing with the appropriation of moneys to the public service such a joint sitting [under s. 63 of the Act] cannot be convened during the first session in which Senate rejects the Bill, but if [counsel's] contention is correct, Parliament could take a short cut by means of a joint session convened for that purpose, without the Senate ever being asked to consider the Bill. There is, in my opinion, no substance in this contention." Later he applied this reasoning in an effective manner to the British Parliament: "With great respect it seems to me that this would be a very novel and surprising doctrine to constitutional lawyers. It would indeed be surprising if a Government which is in the minority in the House of Commons could by advising the sovereign to convene a joint sitting of the House of Lords and the House of Commons swamp the majority of the Commons by the votes of the Lords" (at p. 470). There may indeed be cases where Parliament by unicameral assembly (even with a two-thirds majority) can enact legislation which it would be impossible to pass by simple majorities in each separate House. This would be so especially where the Government has an overwhelming majority in one House, but is in a slight minority in the other.

The lower court in *Ndlwana* v. *Hofmeyr* (reported 1937 A.D. 229) held that where Parliament sits unicamerally it may include in its legislation

But if this argument is not tenable a further omission in section 4 has to be noted. The two previous statutes dealing with the jurisdiction of the courts *vis-à-vis* legislation [8] took great pains to define an Act of Parliament as any instrument purporting to be such and signed by the Governor-General,[9] but section 2 of the Act now under discussion has no definition of an Act of Parliament. It merely speaks of a *law passed by* Parliament. The words italicised by me would imply that the courts have power to inquire whether a particular statute was passed by Parliament; only if it was so passed, would the court's jurisdiction be excluded.[10] In cases, therefore, of bicameral legislation where all the constituent elements have not functioned or assented, or been properly constituted, the courts would certainly not be excluded from inquiry. And in cases where the statute was passed without the necessary quorum or majority, the courts would very probably also have power of inquiry, for these statutes can be said not to have been passed by Parliament as legally defined. Indeed, it could also be contended that even if section 2 had not expressly preserved the testing right in respect of section 137 of the South Africa Act, that right would have remained unaffected by the said section 2.[11]

On the other hand, in the case where the two Houses have not observed the other procedures prescribed by the South Africa Act, it cannot be said that Parliament has not passed the Bill, so that in such cases the testing right would probably be excluded under section 2; in this respect, in the writer's opinion, section 2 merely confirms the common law rule whereunder such inquiry would have been excluded by the enrolled Bill rule.[12]

Where the manner and form of legislation are prescribed by Parliament itself, a distinction has to be drawn for purposes of section 2. If the form interposes an external body such as the Provincial Council or other legislature,[13] then if Parliament enacts

matters cognate to the matters with which it is competent to deal, and presumably it may not go beyond those limits (at pp. 232–233). Van Themaat, *Staatsreg*, p. 445, thinks however that the words "a Bill so passed at such joint sitting shall be taken to have been duly passed by both Houses in Parliament" in section 152 authorise Parliament to legislate by unicameral assembly on all matters, but these words read in their context clearly relate only to those special matters falling under the entrenched sections. It is not an empowering provision of a general nature.

8 High Court of Parliament Act, 1951, and the Appellate Division Quorum Act, 1955.

9 See n. 84, *supra*.

10 See also J. P. Verloren van Themaat, (1957) 20 *Tydskrif*, p. 226.

11 It was accepted in the decision in the *Vote* case that Parliament in South Africa had two meanings "sitting either bicamerally or unicamerally in accordance with the requirements of the South Africa Act" (at p. 463; see also p. 462). The phrase "passed by Parliament" would seem to have made no change to this double meaning, and accordingly the courts can still inquire whether the right Parliament has acted.

12 See n. 3, *supra*, p. 604.

13 There are a few notable examples of this kind in South Africa. Thus s. 149 of the S.A. Act as amended by Act 45 of 1934 provides that Parliament may not alter the boundaries or area of a province or abolish a Provincial Council

a statute without the assent of such external body, the Act has nevertheless been passed by Parliament, and the testing right would appear to be excluded. But if the form prescribed is in respect of the Houses of Parliament themselves, for example where specified majorities are prescribed, it appears much more doubtful whether an Act passed without such a majority can be said to have been passed by Parliament.[14] Again, where an Act has been passed contrary to the exact provisions of the new deadlock clause of the South Africa Act,[15] it is submitted that judicial review is not excluded by section 2, for such an Act would have been passed by one House only and not by Parliament. Finally, mistakes in the content of the Act cannot as result of section 2 be questioned by the courts, but this was almost certainly the position already under the enrolled Bill rule and section 67 of the South Africa Act.[16]

It may therefore be concluded that section 2, even assuming it is legally effective in relation to bicameral legislation, does not exclude judicial review of Acts in all its aspects. It does however appear to do so in certain instances.[17]

A few words must be said about the general effects of the events discussed in this paper as regards the courts.[18] An English writer, Mr. H. W. R. Wade,[19] has stated that by its decision in the *Senate Act* case the court preserved the conception of the judicial function which South Africa had inherited from England and had eschewed setting itself up as something like the Supreme Court of the United States with quasi-legislative authority over the constitution. But this is an exaggerated appraisal of the situation. The Appeal Court has at no time attempted to control the legislature [20] but only to protect guaranteed rights according to the imperative procedural requirements of the Constitution, and a contrary decision to that given in the *Senate Act* case would have done no more than

or abridge its power except by petition of the Provincial Council concerned. (See remarks of Mr. Justice Centlivres on this clause in an address in *Butterworths S.A. Law Review*, 1956, at p. 10.) So also s. 18 of the South West Africa Act, 1949, relating to taxation cannot be repealed by the Union Parliament without consent of the S.W.A. Assembly.

14 As to whether in such cases Parliament is bound at all by manner and form prescribed by itself, see references in n. 4, *supra*, p. 604.

15 S. 63 as substituted by the Senate Act, 1955. The terms of this clause are now very similar to those of the U.K. Parliament Act, 1911 (see (1957) 20 M.L.R., pp. 561–562). Although s. 63 requires the Speaker to certify that the provisions of the section have been duly complied with, there is no provision which makes such a certificate conclusive, as is the case in the U.K. Act. That the courts in South Africa can inquire would appear to follow from the remarks of Centlivres C.J. in respect of the pre-1955 deadlock clause (see n. 7, *supra*, p. 604). As to whether these courts can go behind the Speaker's certificate, see "Parliament and the Courts," pp. 173–174.

16 See "Parliament and the Courts," pp. 171–174.

17 The phrase "passed by Parliament" is thus not meaningless, as suggested by Kahn, *Annual Survey of S.A. Law*, 1956, p. 13. He intimates that for that reason the courts would interpret the phrase as including "purported Acts."

18 The effects on the Senate are discussed in (1957) 20 M.L.R., pp. 562–563.

19 (1957) 74 *S.A. Law Journal*, p. 166.

20 See Centlivres C.J. in the *Vote* case, at p. 456.

this. On the other hand, Mr. Wade points out rightly that the Government legislation at this juncture tampered with the legislature rather than with the administration of justice, as it had done in the previous attempt to establish the High Court of Parliament, a political judiciary.[21] It may be even added that the *Senate Act* decision has had the incidental effect of saving the judiciary from further Government threats, even though it be at the expense of the Upper House of the legislature. At the same time, the fact cannot be overlooked that this decision has made possible a serious curtailment of the testing right, and thereby the loss of a redoubtable guardian of the Constitution. It must not be assumed, as Mr. Wade appears to do, that conditions in the sphere of politics and the Constitution are the same in South Africa as they are in the United Kingdom. South African experience has shown that constitutional guarantees, and even constitutional propriety, need the protection of an independent and impartial body such as the courts of the land, which have always been held in high regard. And this appears to have been the general view of the courts in the *Vote* and *High Court* cases. Recent events indeed call for the extension of judicial review rather than its curtailment, and this might be taken into the field of individual rights, but that would now involve considerable revision of the Constitution, a possibility which at the moment seems a little remote.

Apart from the question of judicial review, what has been the effect upon the Appeal Court itself? The fact that several prominent Appeal Judges appointed before the Quorum Act shared in the majority opinion in the *Senate Act* case served to remove any reflections that might possibly have been the unfortunate result of the reconstitution of the court, and at no time has the position of the new judges been publicly questioned, not even in the heat of parliamentary debate. The Appellate Division as enlarged conforms to the general conception of what a court is. But will this enlarged court continue in the earlier high tradition of our Appeal Court, and maintain the status and reputation that had been built up in the first forty-five years of its history? The panel of eleven as such has functioned only once and may seldom, if at all, be required to function again. As regards the court's ordinary work, there is already evidence that the court is larger than is needed. On the retirement of some of the eleven judges, their places have not been filled. They have either been appointed to continue in an acting capacity, or other acting Judges of Appeal have been appointed, and now Act 68 of 1957 has made the appointment of acting Judges of Appeal easier.[22] At the end of 1957 there were only nine permanent appointments, instead of

[21] *S.A. Law Journal, loc. cit.*, pp. 160–161.
[22] s. 12.

eleven, with four acting.[23] It also appears that the judges appointed before the Quorum Act are nearly sufficient to carry the work of the Appellate Division.[24] One hopes that when they leave the Bench, there will be adequate experience to carry on the valuable work of the court and to inspire the confidence of the public and of the legal profession. One may also ask whether the time has not come in South Africa for the method of appointment of judges to be changed; perhaps this important function should be transferred from the executive to a special committee representing judicial and professional, in addition to political, interests as is now the case in France and in Israel, to mention only two examples.[25]

B. Beinart.*

[23] See Index to 1957 (4) S.A. Reports. Two of the acting Judges of Appeal were appointed to relieve permanent Judges of Appeal on other duties or during illness.

[24] In 1953 in a total number of 65 reported appeals, 86 judgments were delivered, which were distributed as follows amongst the six judges: 20, 19, 17, 12, 12, 5 plus 1 by a temporary acting judge. In 1954 there were 63 such appeals containing 94 judgments distributed 27, 13, 23, 13, 12, 6. In 1955 the number of appeals reported were 75 consisting of 109 judgments divided 22, 8 (Greenberg J.A. who retired at beginning of the year), 33, 24, 13, 9. The first reports of appeals heard by the enlarged Bench appeared in 1956; there were 76 appeals comprising 110 judgments distributed 32, 25, 13, 10, 5 (Van den Heever J.A. who died at beginning of 1956) 11, 6, 1, 2, 3, 2. In 1957, 67 appeals were reported containing 88 judgments distributed 11 (Centlivres C.J. who retired at end of 1956), 33, 14, 4 (Fagan C.J. who acted as Officer Administering the Government for a substantial period of the year) 9, 3, 4, 0, 1, 2, 2, 2 plus 3 by acting Judges of Appeal. The reported appeals constitute somewhat less than half the appeals heard, but they are none the less the important ones for legal purposes. The actual number of appeals disposed of were 168, 205, 180, 214, and 180 respectively for each of the years between 1953 and 1957, according to figures supplied by the Registrar of the A.D.—see n. 43, *supra*.

[25] The appointments committee in Israel consists of three judges, two members of the Government, two members of Parliament and two barristers. See on the whole question the article by B. R. Bamford, "Aspects of Judicial Independence" in (1956) 73 *S.A. Law Journal*, pp. 350 *et seq.*, esp. p. 389.

* W. P. Schreiner Professor of Roman Law, University of Cape Town.

Will someone please tell me,

WHAT IS NATURAL LAW?

I

Well, why?

THE traditional view of natural law is that it is a body of immutable rules superior to positive law. It is ideal law since it consists of the highest principles of morality towards which humanity is striving. It is also absolute law since it is not the result of any convention, but is discoverable by the exercise of reason. "The law of nature," wrote Grotius, "is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that in consequence such an act is either forbidden or enjoined by the author of nature, God."[1] It should be noted that the rational nature of man is not necessarily subordinate to the will of God, and Grotius himself stated as a hypothesis that natural law is so immutable that "even God . . . cannot cause that two times two should not make four."[2] It was thus possible to be a rationalist and a natural lawyer and, although the religious interpretation has survived to this day through scholastic theology, there is another side to the classical natural law doctrine which is rationalistic.[3]

The idea of natural law as ideal law was not the invention of the renaissance. It was known to the ancient Greeks and was elaborated by Plato and Aristotle.[4] Moreover, it played a significant role in Roman law and there are references to it both in the *Institutes* and the *Digest*.[5] It was later incorporated in the teachings of St. Augustine and the Fathers of the Church and is today an integral part of the doctrines of the Church.[6] In its rationalistic sense natural law provided the basis of the *jus gentium* and as such it formed the basis of international law. In the seventeenth

[1] *De Jure Belli ac Pacis*, I, i, x, para. 1. (Kelsey's translation in *Classics of International Law*.)

[2] *Loc. cit.*, para. 5.

[3] See generally D'Entrèves, *Natural Law*, esp. at pp. 52–53.

[4] The early Greek philosophers first distinguished between φύσις and νόμος. Later Aristotle made the distinction explicit: *Nicomachean Ethics*, v. 7, 1; *Rhetoric*, I, 13, 2. See W. Jones, *The Law and the Legal Theory of the Greeks*, Chap. III, and by the same author, *Historical Introduction to the Theory of Law*, Chap. IV. Literature both ancient and modern is full of appeals to higher law; *cf.* T. Ascarelli, "Antigone e Porzia" in xxxii (1955) *Rivista internazionale di filosofia del diritto*, pp. 756 *et seq.*

[5] *e.g.*, Gaius *Inst.*, I, 189; Justinian, *Inst.*, 1, 2 pr; I, 2, 2; I, 20, 6; *Dig.* 1, 5, 24; 47, 2, 1, 1; 50, 17, 206. *Cf.* Krüger, *Geschichte der Quellen des Römischen Rechts*, 2nd ed. (1912), pp. 131 *et seq.*; Schulz, *Principles of Roman Law*, pp. 35 *et seq.*

[6] See the following recent studies: D'Entrèves, *op. cit.* (1951); Micklem, *Law and the Laws* (1952); S. Cotta, *Il concetto di legge nella Summa theologiae di Tommaso d'Aquino* (1955).

and eighteenth centuries natural law became universally accepted, not only in jurisprudence through the influence of the naturalists like Pufendorf and Thomasius but in political philosophy as well.[7] Even at the beginning of the nineteenth century, under the influence of natural law, codes were promulgated, of which the outstanding example is the Austrian Civil Code of 1811.[8] In England as early as the sixteenth century Christopher St. Germain made his famous observation that, whereas the civilians approach jurisprudence in terms of natural law, the common lawyer's approach is in terms of reason and the reasonable man.[9] Later, in the eighteenth century Blackstone, writing as an English lawyer and lecturing to an English audience at Oxford, wrote: "This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from the original."[10] As late as 1861 Maine, referring to equity in English law observed: "The theory of a set of legal principles, entitled by their intrinsic superiority to supersede the older law, very early obtained currency both in the Roman State and in England."[11]

The nineteenth century is generally associated with the decline of natural law. The fact was that that century brought about a revolution in legal thinking in Europe, to which there is no parallel in legal history and of which the causes are even today dimly understood and inadequately assessed. Suffice it to say that the main vehicles of this revolution were the Analytical school in England under Austin and the Historical school in Germany, which later came under the control of the Pandektists. There were other currents, such as the French school of exegesis, but that school, because of its limited objectives, was hardly destined to exercise any lasting influence. For our purposes, it is enough to say that the chief victim of this revolution was natural law. But the decline and fall of natural law was illuminating, for it was shown that naturalistic thinking could be incorporated both in the work of the Pandektists and in Savigny's historical school which was, in

[7] Whereas Locke and Rousseau adhered to the law of nature, others, like Hobbes and Montesquieu, paid lip service to it. Moreover, some positivists, like Martens, did not deny the existence of the law of nature, to say nothing of the "Grotians"; *cf.* Oppenheim, *International Law*, 7th ed., pp. 84–95.

[8] This code contained the famous provision that doubtful cases "shall be decided in accordance with the law of nature" (Art. 7). As to the meaning and subsequent history of this provision see now Del Vecchio, *General Principles of Law*, *passim*. *Cf.* J. Esser, *Grundsatz & Norm in der richterlichen Fortbildung der Privatrechts*, esp. Chaps. III, IV, IX.

[9] *Doctor and Student*, Chap. V.

[10] *Commentaries on the Laws of England* I, at pp. 40–41; he criticises, however, Lord Chief Justice Hobart for thinking that an act of the legislature against natural justice is invalid; *ibid.*, n. 3.

[11] *Ancient Law*, Chap. III, at p. 36 (World's Classics, 1950).

principle, opposed to natural law.[12] We know now that that was by no means the final burial of natural law. The last fifty years have witnessed a revival of natural law thinking, especially in the periods following the great wars, but, irrespective of historical and political causes, natural law has remained alive because it embodies the idea of improvement in legal institutions; indeed it is difficult to think critically of positive law without reference to ideal law. Thus on the Continent natural law ideas re-emerged about the end of the nineteenth century, first through Ihering's criticisms of the *Begriffsjurisprudenz*, taken through the Tübingen school of the jurisprudence of interests,[13] and later, more openly, through the neo-naturalistic work of Stammler, Gény, Le Fur and others.[14] Since the end of the last war there has been a further revival of natural law, mainly associated with the work of H. Coing, Ernst von Hippel, and Thieme, whereas the Italian school under Del Vecchio has been consistently advocating natural law ideas for over fifty years.[15]

As against the revival of natural law thinking English jurisprudence has stood firm upon its analytical premisses. "Modern legal writers," wrote Brierly, "especially in England, have sometimes ridiculed the conception of a law of nature, or while recognising its great historical influence they have treated it as a superstition which the modern world has rightly discarded."[16]

[12] See Koschaker, *Europa und das Römische Recht*, 1953, pp. 248–254; also *ibid.*, pp. 254/290 esp. pp. 279 *et seq.* *Cf.* also Thieme, "Die Zeit des Späten Naturrechts" in 56 *Zeitschrift der Sav.-Stift.* (ger.Abt.) (1936) pp. 202–263; Wieaker, *Von Römischen Recht*, 1944, p. 265; Ehrlich, *Fundamental Principles of the Sociology of Law*, 1936, at p. 423; Del Vecchio acutely observed that "since the primary intent of the German historical school was precisely to oppose the idea of codification, the boasted triumph of modern jurisprudence (over natural law), in this aspect at least, resembles a Pyrrhic victory." He goes on to quote Gierke's view of the "material victories" that natural law gained after its downfall through the efforts of its conqueror; *op. cit.*, 2–3 and *passim.*

[13] *Cf. The Jurisprudence of Interests* (Selected Writings), 1948, pp. 9 and 14.

[14] See Haines, *The Revival of Natural Law Concepts.*

[15] H. Coing in his *Grundzüge der Rechtsphilosophie*, 1950, postulates a natural law which is claimed to be based on objective values. Among these, the value of the individual is the most important. Coing's analysis, which is most acute, is hardly known in this country. Similarly with the work of Ernst von Hippel, whose *Einführung in die Rechtstheorie—ein Dialog* (1932) 4th ed. 1954, is a significant contribution to scholastic legal thought. Also see Thieme, *Das Naturrecht und die Europäische Rechtsgeschichte*, 1954, which is a plea for a universal natural law against the narrow nationalistic view of positive law. *Cf.* Cohn "German Legal Science Today" in 2 I.C.L.Q. (1953) pp. 169 *et seq.* Del Vecchio's brilliant *Philosophy of Law* has appeared recently in an English version (1953), but has, surprisingly, failed to gain in this country the recognition it deserves, and which has been accorded to it almost everywhere else. *Cf.* an interesting article by R. Pizzorni, "La rinascita del diritto naturelle nella scienza del diritto," in Vol. XXXIII (1956) *Rivista internazionale di filosofia del diritto*, pp. 230 *et seq.*

[16] *The Law of Nations*, 5th ed. at p. 16. The latest edition of Salmond's *Jurisprudence* (11th ed. 1957 by Glanville Williams) states: "The term natural law, in the sense with which we are here concerned, is now fallen almost out of use" (at p. 28). Professor F. H. Lawson wrote: "I have

Pollock, in his essay on the law of nature, attributes the neglect of natural law to the English dislike of canon law [17] but he also thought that natural law covered "a great part of what is commonly understood in this country by moral and political philosophy." [18]

There is no doubt that the rejection of the law of nature has been based on substantial criticisms which followed three different lines of thought. In the first place, Montesquieu indicated that in the development of laws environment rather than abstract reason is decisive. This view was taken over first by the Historical school and later by the Sociological school which understood environment in the more active sense of a society dominated by social interests.[19] Secondly, a series of thinkers from Hume to present-day analysts have demonstrated that reason and logic have a very limited function in the social sciences and law in particular. Outside the physical sciencies there is no causal connection between facts or ideas. Any such connection is based upon empirical observation. Reason cannot prescribe a course of conduct, it can only indicate the best means of achieving a certain end, once a principle of conduct is accepted. But the principle itself must be chosen arbitrarily.[20] Natural law, therefore, can hardly be the dictate of right reason. Thirdly, the critical attitude of the Analytical school towards the law of nature was decisive in English jurisprudence. Bentham led the attack against imprecise thinking in general and Blackstone's natural law in particular. "A great multitude of people," he wrote, "are continually talking of the Law of Nature; and they go on giving you their sentiments about what is right and what is wrong: and these sentiments, you are to understand, are so many chapters and sections of the Law of Nature." [21]

no concern here with natural law as a philosophical concept. I am not myself sure that it exists or that it is of any use if it does exist." See *A Common Lawyer Looks at the Civil Law*, Michigan U.P., 1952 at p. 30; he goes on to state, however, that much was accomplished in the name of natural law.

17 *Essays in the Law*, at p. 57.

18 *Essays in Jurisprudence and Ethics*, at p. 20. Bryce shared this view; see *Studies in History and Jurisprudence*, ii, at p. 169. "I had long known," wrote Pollock of Lorimer's *Institutes of Law*, "of *Naturrecht* as a thing existing in German books, but it had never come my way to any serious extent. . . As I came to the last page I said to myself with a mental gasp and shiver, 'Ugh! ugh! now I know what *Naturrecht* is.'"—*ibid.*

19 This view with special reference to the Sociological school is considered in detail by the present author in "Le influenze del diritto naturale sulla scuola sociologica" in XXXIII (1956) *Rivista Internazionale di filosofia del diritto*, pp. 470 *et seq.*

20 See W. Friedmann, *Legal Theory*, 3rd ed., pp. 80–81; Stone, *The Province and Function of Law*, Chap. VII; D. Lloyd, "Reason and Logic in the Common Law" in 64 L.Q.R. (1948) 468 *et seq.*

21 *An Introduction to the Principles of Morals and Legislation*, Chap. II, 14, n. 6. *Cf.* also Everett (editor), *A Comment on the Commentaries by Jeremy Bentham*, section III. But Bentham was anxious to replace natural law by the principles of utility; *cf.* Stone, *op. cit.*, Chap. X; W. Friedmann, *op. cit.*, Chap. 18; the present author's "Social and Ethical Elements in Analytical Jurisprudence" in 67 Jurid.Rev. (1955) 79, at pp. 94–95.

Austin also rejected natural law which he called "ambiguous and misleading."[22] His purpose was to build a science of positive law by which he meant a science of laws "set by men as political superiors, or by men, as private persons in pursuance of legal rights.[23] According to this view "the science of jurisprudence (or simply and briefly, jurisprudence) is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness."[24] He was critical of the view that natural law is right reason expressed through our moral sense. But "is there any *evidence* that we are gifted with feelings of the sort?", asked Austin and immediately proceeded to supply the answer: "That this question is possible, or is seriously asked and agitated would seem of itself a sufficient proof that we are *not* endowed with such feelings."[25] We are often at a loss as to the morality or otherwise of certain acts and even when we do pronounce an act moral it is difficult to say whether our judgment was instinctive or conditioned by our environment. But if moral sense may also depend on environment, it can hardly be identical in all human beings. Austin insisted upon a clear separation between legal and moral rules. Whatever the basis of natural law it is clear that it does not consist of legal rules within the meaning of his definition of law. It is, therefore, outside the scope of his jurisprudence. Professor Stone has pointed out that these attacks against natural law as a theory of justice were so effective that "the theory of justice itself was stricken low and so far as English law teaching is concerned has not to this day fully recovered."[26] Almost a hundred years since Austin's death, jurisprudence is still dominated by the Analytical school.[27]

It is true that these criticisms suggest that natural law cannot claim to be the dictate of right reason permanent and immutable. Opposite currents of thought have frequently made their appearance under the cloak of natural law. "But the importance of this theory to mankind," wrote Sir Henry Maine, "has been very much greater

[22] *The Province of Jurisprudence Determined, etc.* (ed. by H. L. A. Hart) at p. 10.

[23] *Op. cit.*, at p. 124.

[24] *Op. cit.*, at p. 126.

[25] *Op. cit.*, at p. 95 (Austin's italics). There is a striking similarity between these arguments and Kelsen's in his *General Theory of Law and State*, pp. 8 *et seq.* Kelsen wrote: "Whether the principles of natural law are presented to approve or disapprove a positive legal order, in either case their validity rests on judgments of value which have no objectivity. A critical analysis always shows that they are only the expression of certain group or class interests." (*Loc. cit.*, at p. 11).

[26] *Op. cit.*, at p. 9.

[27] Austin died in 1859. *Cf.* D. Browne in *The Journal of the S.P.T.L.* (1953) Vol. II, No. 2 at p. 87. For some critical remarks see Stone, *op. cit.*, pp. 3–15. Roscoe Pound wrote recently of the "misunderstanding and prejudice" towards natural law in America, see Del Vecchio, *op. cit.*, introduction at p. 1. This is strange for a country that owes so much to the law of nature; see Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (1957).

than its philosophical deficiencies would lead us to expect."[28] The critics have always proceeded on the assumption that, having established this, it is no longer of any use in jurisprudence to speak of the law of nature. The efforts of some jurists, of whom the most prominent are Stammler and Del Vecchio, to introduce the idea of natural law with a "variable content" or a content variable in its particular application depending on the time and place, was seen as an attempt to rescue the law of nature from obscurity and oblivion. But an uneasy feeling persists that some value should be attached to the law of nature, although it is not clear whether this is due to the role that natural law has played in the past or to its value as a contribution to the analysis of the ends of law. Thus natural law is still discussed in this country and most textbooks contain more or less detailed accounts of it. But it is generally regarded either as a contribution to Ethical jurisprudence, from which most lawyers recoil, or as a record of only historical importance. It is indeed not surprising that law students are seldom interested in natural law beyond their examination requirements. They consider that it has little or no connection with law and tend to ignore the paradox that, whereas almost by convention natural law is assumed to be valueless,[29] it nevertheless occupies a large section of most books of jurisprudence.

There is a special reason why natural law is being ignored at the present time; it is the popularity of the current linguistic movement in English jurisprudence which derives partly from latent Austinianism, partly from Hohfeld, but particularly from the modern Oxford school of linguistic analysis. The influence of this school has made any consideration of the idea of natural law even more remote and improbable than it has been until recently. Roughly speaking,[30] this school holds that statements are admissible only in so far as they can be verified by empirical observation. This can be done by laying down the conditions or the specific framework within which a general statement may be understood. In other words general statements must be particularised if they are to have any significance. For language is a far more complicated apparatus than mathematical logic suggests. It follows that the main object of philosophy is to analyse language, as the understanding of thought is best achieved through an analysis of its means of expression. It is not the object of philosophy to consider emotive questions, such as "what is natural law?" since such questions are factually meaningless.

[28] *Op. cit.*, Chap. IV at p. 61.

[29] "To this day," wrote Del Vecchio, "the rejection of natural law is deemed an indispensable act of faith and almost a mark of good breeding for the jurist"; *op. cit.* at p. 3.

[30] I am aware of the danger of oversimplification; I can only plead in mitigation Professor Ayer's opinion that "The precise formulation of this (the verification) principle is a complicated matter: I am not sure that it has even yet been satisfactorily done," *The Revolution in Philosophy* (coll. essays), 1956, essay on "The Vienna Circle," 70, 74.

No attempt has been made to show convincingly that that is so in the realm of law, and it is doubtful whether the linguistic trend in English jurisprudence has achieved any spectacular results.[31] It has certainly led to the neglect of legal philosophy in its traditional sense, although few analysts will regret that. However, if, as Plato and Aristotle claimed, laws are averages, the language of the law must be designed to cover not precise cases but a variety of instances.[32] Law, therefore, prior to linguistic analysis, should be a collection of meaningless rules. To render legal norms significant, the legal analysts will explain, a certain statement must be read in its specific context, that is, within a particular legal system and subject to the special circumstances of each case. I doubt if this method is, as it has been claimed, "overwhelmingly helpful."[33] In the first place, lawyers consciously or otherwise, normally tend to understand generalities subject to prevailing legal and social conditions within a legal system. This accounts for the fact that law has remained meaningful to lawyers in spite of the use of such abstract terms as the reasonable man, negligence, crime and so forth. To take another example, statute law, although couched in general terms, regulates future conduct even before it is particularised by case-law. It is not here suggested that the philosophical—or better perhaps the linguistic approach—is valueless, and it would be a poor day for jurisprudence if lawyers were to resurrect Sir Matthew Hale's opinion that "Philosophers . . . are most Comonly the worst Judges that can be, because they are transported from the Ordinary Measures of right and wrong by their over fine Speculacons, Theoryes and distinctions above Comon Staple of Humane Conversations."[34] But philosophical precision is not always desirable in law, particularly if it involves neglecting the

[31] For a recent account see Dias & Hughes, *Jurisprudence*, 1957, pp. 14 *et seq.* The learned authors follow the positivism of Ogden & Richards and Korzybski. *Cf.* also the literature cited there, and see Quine, *From a Logical Point of View*, 1953; Kraft, *The Vienna Circle*, 1953, A and B. See further Bergmann, *The Metaphysics of Logical Positivism*, 1954, esp. Chap. 3. There have been several contributions to law recently from the standpoint of linguistic analysis, most of which are well known. For the latest example see J. Z. Krasnowiecki, "Philosophy and the Practice of Law" in LXVII *Mind* (No. 226, April, 1958) pp. 227 *et seq.*

[32] Plato, *Polit.* 294B; 295A–B; Aristotle, *Pol.*1269a 22; 1282b 19; 1286a 4; 1287b 11.

[33] Dias & Hughes, *op. cit.* 14.

[34] Holdsworth, *History of English Law*, 1924, Vol. V, Appendix III, p. 503. That this prejudice was not an isolated instance is shown by the fact that a modern judge found it necessary to say that he speaks of philosophers "in no disparaging sense, for what is a philosopher but one who, *inter alia*, reasons severely and with precision?" (*per* Lord Asquith) in *Stapley* v. *Gypsum Mines, Ltd.* [1953] 2 All E.R. 478, 489 *et seq.* On the other hand, contemporary adherents of the law of nature generally appreciate the necessity for a structural analysis of the law in conceptual terms. See, *e.g.*, the stimulating essay of H. Coing on "Geschichte und Bedeutung des Systemgedankens in der Rechtswissenschaft" in Heft 17 of the *Frankfurter Universitätsreden* pp. 26 *et seq.*

traditional field of jurisprudential thinking. In the second place, philosophical methods may sometimes be inappropriate or irrelevant to law. Law is not necessarily concerned with the truth of a proposition. We know that law accepts fictions and presumptions that may be factually false.[35] It is characteristic how the courts have consistently refused to incorporate any analytical calculus in their everyday work, although linguistic analysis in law dates at least as far back as Hohfeld. Where precision is necessary, the courts have been guided by precedent rather than logic.[36] But more generally, emotive propositions may give rise to legislation and social change. Consequently, whereas the philosopher may not be concerned with emotive propositions, it is the duty of the jurist to foresee the results which these propositions will have, if they are to be given legislative validity.

Thus the question "what is natural law?" is still a fruitful field for analysis, if not in terms of linguistic precision, at least in terms of its practical significance for the lawyer. The lawyer's duty, in fact, is not to test it by empirical observation in order to find out whether it is true or not, but rather to consider the type of legal order that will result from the application of natural law.

II

A. It is generally agreed that natural law has been a convenient formula for a variety of ideas rather than a single distinct and consistent theory.[37] This assumption should be the starting point of any critical examination of the law of nature rather than a reason for its rejection. Positivists have maintained that natural law, being ideal law, is of no concern to lawyers whose main interest is positive law. Moreover, since natural law is only a cloak for different ideologies it can have no objective significance; it is, therefore, valueless. Such a conclusion is misleading as it assumes, first, that law can be strictly separated from ideas, and secondly, that natural law could have some practical significance only if it were

[35] See F. H. Lawson, "The Creative Use of Legal Concepts," Vol. 32, No. 5 (1957) *New York University Law Review*, pp. 909 *et seq.* O. C. Jensen in his interesting study, *The Nature of Legal Argument*, (1957) wrote: "At any rate, a court case when first looked at from the standpoint of modern logic does resemble some strange conjuring performance," p. 1.

[36] *Cf. Esdaile* v. *Lewis* [1956] 2 All E.R. 357, where the Court of Appeal held that it was bound by precedent to hold that term "subletting" does not cover cases where only part of premises was sublet (*per* Jenkins L.J.). There is a spate of dicta indicating that logic does not necessarily prevail in law: *e.g.*, *Quinn* v. *Leatham* [1901] A.C. 495, 506 (*per* Lord Halsbury); *Weld Blundell* v. *Stephens* [1920] A.C. 956, 986 (*per* Lord Wright); *Best* v. *Samuel Fox* [1952] A.C. 716, 727 (*per* Lord Porter). As early as 1931 Lord Macmillan, in an address on "Law and Language," concluded as follows: "It is not, however, with the technical words of our craft that I am so much concerned. These have attained a reasonable scientific precision." He goes on to plead for a more accurate use of ordinary language. See *Law and Other Things*, 1938, 147, 169. *Cf.* Jensen, *op. cit.*, Chap. I.

[37] Goodhart, *op. cit.*, pp. 5, 30; Stone, *op. cit.*, Chap. VIII; Dias & Hughes, *op. cit.* p. 350; Friedmann, *op. cit.* 17–19.

one consistent theory. In fact it is impossible to separate law from ideas[38] and these can have an objective value for the outside observer. The type of legal order with which a lawyer is concerned depends upon the ideology that forms the background of a particular legal system. For example, legal analysis does not explain why a legal system is a marxist or a capitalist one. It is unrealistic to assume that lawyers can apply a legal system without having any regard for its ideological background.[39] It is not the fault of natural law theories that jurists have found it convenient to treat them as a single idea. Nor is the historical approach to natural law to be specially recommended if its effect is to deaden the interest of the student by obscuring the sociological basis of all natural law thinking.

Perhaps the best way to approach the problem of natural law is to consider the different meanings attached to this term. In his book *English Law and the Moral Law*, Dr. Goodhart has written recently: "As the classic phrase 'law of nature' is so highly charged with emotion and has meant so many different things at various times in history, I think that it is preferable to speak of the moral law instead. This does not, however, take us very far because there are different views concerning the basis of this moral law."[40] It is clear that in this view, which is shared by several modern jurists, natural law and the moral law are given an identical meaning.[41] Others distinguish between natural or ideal law as a social value and the moral law as an individual value. As, however, it has been pointed out, these distinctions are artificial since social values cannot be understood apart from individual ones.[42]

How far is, then, natural law tautologous with the moral law? The answer would appear to be a complex one, for criticisms of the analytical thesis are frequently based upon the argument that law as an abstract structure can have no meaning apart from its social and ethical substance. It would follow that, as morality cannot be excluded from the legal structure, all lawyers must be natural lawyers. In this sense the term natural law is merely descriptive of the social and ethical content of the legal norms, and is, therefore, objective.[43] In the only article on natural law that has

[38] *Cf.* Goodhart, *English Law and the Moral Law* (The Hamlyn Lectures 1953) *passim*; Ripert, *La Règle Morale dans les Obligations Civiles*, 4th ed. 13–18, pp. 21 *et seq.*

[39] Kelsen has claimed that the jurist has to assume the *grundnorm* which he called "the initial hypothesis." Even if this be granted, it is hardly possible to apply the norms emanating from the basic norm without bearing constantly in mind the political and psychological background of a legal system. *Cf.* Stone, *op. cit.* pp. 95–96.

[40] Goodhart, *op. cit.*, at pp. 30–31.

[41] E. G. D'Entrèves, *op. cit.* Chap. V, VI; Salmond, *op. cit.*, at p. 26.

[42] See generally Du Pasquier, *Introduction à la théorie générale et à la philosophie du Droit*, 3rd ed., 1948, pp. 312–313.

[43] It would appear that it is in this sense that Dr. Goodhart also speaks of an "objective moral law," *op. cit.*, 30.

appeared for many years in a British legal periodical, Roscoe Pound distinguishes natural natural law, which is ideal law in a universal and abstract sense, from positive natural law, which is an "idealised version of the positive law of the time and place."[44] It is this latter which, as Pound claims, is normally called natural law, and its function is to be used" as a critique of the ideal elements in the positive law rather than as a test of the validity of positive laws or an authoritative guide to all law making and all application of laws.[45] Pound's idea of positive natural law would appear to coincide with our analysis of natural law as a descriptive term of the moral content in any particular legal system. However, in so far as positive natural law is to be used as a critique of existing law, there is little difference in kind between ideal law in the universal sense and positive natural law, since both can only exist in a subjective rather than an objective sense. Natural law in the objective sense of the moral law is free from metaphysical ambiguities. Moreover, it is a valuable notion as it helps to place law in its social context and leads to the appreciation of law as a social discipline. As Dr. Goodhart has pointed out, it is this moral content of law rather than force that gives law validity.[46] But natural law in this sense is hardly a suitable subject to be discussed historically. It belongs to Analytical jurisprudence as criticism of formal definitions of law and of the excesses of conceptual analysis, and to the sociological school as the raw material to be used for the formulation of social and individual interests.

B. Natural law is not always used in the objective sense of the moral law. As Pound has suggested,[47] it is also used in an abstract universal sense, as law superior to positive law. It is further used as a criterion of positive law in the sense that a jurist may test the objective moral content of natural law by reference to his own standards. In both these senses natural law is subjective and the question arises whether or not this type of natural law can be of any legal significance.[48] The positivist answer is illustrated in a recent reappraisal of natural law: "What these theories (of natural law) do say about the nature of positive law is not very instructive. Some of the characteristics, which have been explained, such as the origin in a social contract, must be rejected

[44] "Natural Natural Law and Natural Positive Law," 68 L.Q.R. (1952) pp. 300 *et seq.* at p. 300. *Cf.* also Pound, *Interpretations of Legal History*, 1923, pp. 5 *et seq.*

[45] 68 L.Q.R. 300.

[46] *Op. cit.*, p. 30. *Cf.* also Ernst von Hippel, *op. cit.* (1932) p. 33.

[47] 68 L.Q.R. 300.

[48] Dr. Goodhart writes: "It is obvious that used in this (subjective) sense there can be no objective moral law because each person must be a law unto himself in deciding what he believes is right or wrong. . . . This subjective interpretation compels the jurist to disregard morality almost completely," *op. cit.*, at p. 29.

as untrue, while others are a matter of personal belief."[49] However, if these subjective formulas of natural law are of little value, it is legitimate to inquire whether it is of any advantage to teach these theories to students.[50] It is submitted that, vague as it is, this subjective aspect of natural law performs a most useful function, if treated in a manner other than the traditional historical one. In the first place, it is not conducive to clear thinking to refer to a great number of different theories under the name of natural law. Secondly, subjective ideas may have an objective significance for persons other than those holding them. Thirdly, the jurist's duty would appear to be, not to discuss ideas in the abstract, but to consider the practical results of these theories in terms of the legal order. Whether the theories of natural law are true or false is irrelevant, as empirical observations cannot prove them. But even if it were possible to prove them, the jurist would derive no benefit *qua* jurist. Their desirability, or otherwise, is a matter of personal preference and the jurist has no greater right to an exclusive opinion than the political theorist, the sociologist or the economist. The jurist, however, can translate these theories into legal terms by demonstrating in an objective manner the type of legal order to which a particular theory may give rise. The jurist's and especially the teacher's duty, then, in relation to natural law in the subjective sense is to show the various types of legal order to which different theories of natural law may result and present them as social alternatives. To adapt Roguin's science of logical possibilities, we may plead for a science of social alternatives.[51] It follows that the true significance of natural law will emerge not by dealing with it in the historical sequence of the various natural lawyers but by classifying the authors in accordance with the type of legal order that results from their particular theories.[52]

This analysis suggests that traditional ideas about Ethical jurisprudence should be radically altered. I have elsewhere indicated that there is little or no difference between natural law thinking and the sociological school and no purpose would be served to repeat

[49] Dias & Hughes, *op. cit.* 370.

[50] It is characteristic, for instance, that all writers find it necessary to deal at some length with natural law, and this tendency is not restricted to textbook writers only.

[51] Professor Stone's brilliant reappraisal has done so much to bring Roguin's work to the attention of the English-speaking world; see Stone, *op. cit.*, Chap. III.

[52] This would also appear to be the view of Olivecrona in his *Law as Fact*, 1939, at p. 164: He writes that the proper question to ask is "what sort of feelings and ideas have supplied the motives for such and such legislation?" Prof. Hall has observed that the construction of a "Sociology of Natural Law" is implicit in the work both of Windelband and Maine, *Readings in Jurisprudence*, at p. 3, n. 4. Since this essay was completed my attention has been drawn to Theodor Viehweg's remarkable book *Topik und Jurisprudenz*, 1953, in which somewhat similar conclusions are reached, but from a naturalistic standpoint. For an appreciation of Dr. Viehweg's thesis, see H. Coing, "Über einen Beitrag zur rechtswissenschaftlichen Grundlagenforschung" in XLI–3 *Archiv für Rechts- und Sozialphilosophie* (1955) pp. 436 *et seq.*

the arguments here.[53] Suffice it to say that the sociological approach would appear to be a more concrete way of tackling questions of natural law. To quote Pound's words ". . . This formulation of the jural postulates of civilisation gives us natural law once more . . . But it is natural law drawn from observation of the concrete civilisation of the time and place and endeavours to ascertain the ideas of right which it presupposes, whereas the eighteenth-century natural law was a deduction from the nature of the abstract man. Also it is a practical natural law and, as it has been put, a natural law with a changing or a growing content."[54] Thus, the distinction between the Ethical and the Sociological schools is arbitrary. Paton says that the former deals with ultimate ends whereas the latter deals with immediate ends.[55] But it is difficult to avoid the conclusion that the difference is only one of degree, consisting in expressing the same principles in terms of an abstract, as opposed to a more concrete, terminology.[56] Apart from these considerations, if we are to consider natural law in terms of the actual results of the various theories in society, natural law would seem to be nothing more than part of the Sociological school. This should not lead us to underestimate the value of natural law. We would still be concerned with the moral aspects of law, except that our approach would be a more practical one, closer to the understanding of the lawyer.

At this juncture a difficult question will have to be decided. Granted that we consider natural law within the framework of the sociological school; granted also that natural law theories are to be discussed in terms of their actual effects upon the legal order; the question still remains, which particular natural law theories are we to discuss in the limited time devoted to a jurisprudence course?[57] Obviously, here a personal element of choice cannot be

[53] I have dealt with this subject in two articles: in Vol. 3 *Archives de Philosophie de Droit* (New Series) (1957) pp. 169 *et seq.*, and more especially in 33 *Rivista Internazionale di filosofia del diritto* (1956) pp. 740 *et seq.*

[54] *Interpretations of Legal History*, p. 149.

[55] "To the teleological (*i.e.*, philosophical) school the functionalists lay the pen when the task is only beginning": *A Textbook of Jurisprudence*, 1946, 29. *Cf.* Stone, *op. cit.*, pp. 30–31.

[56] Olivecrona reaches a similar conclusion on the ground that the distinction between justice and expediency is arbitrary, *op. cit.*, at p. 164.

[57] It must be already obvious that I do not share the view of Dias & Hughes that jurisprudence is merely "a disciplined study of the meaning of the terms in a lawyer's vocabulary"; *op. cit.*, p. 20. I believe this to be an unduly narrow view of the function of jurisprudence. Professor O. C. Jensen *op. cit.* (*supra*, n. 35) makes a more modest claim when he writes, "Although the law, like any other branch of learning, has produced a quantity of verbiage, there are, no doubt, large areas of the law that do not need to be harrowed by logical analysis": p. xv. In this connection it is interesting to recall Plato's view that "the use of words and phrases and the avoidance of strict precision is in general a sign of good breeding; indeed the opposite is hardly worthy of a gentleman"! He adds, however, that "precision is sometimes necessary": *Theaet.* 184C. *Cf.* also *Leg.* 6, 769D and 9, 867D; but the tendency to detect linguistic analysts before the emergence of the modern school must be resisted. Plato may have analysed language; so did Humpty Dumpty.

avoided, but it may be of interest for teachers to hear, briefly, of at least one way of discussing the Sociological school.

Thinking about law within a sociological framework may be divided, for practical purposes, into four sections.[58] The first two sections deal with the State as the object of the legal order and the individual as the object of the legal order respectively. A great deal of traditional natural law may be discussed under these headings, and within each section the treatment can follow historical lines. Thus, the section on the State may include all those theories in which the State is made the ultimate object of society. Plato is a convenient starting point and he may be followed by Hobbes, Hegel and others. A detailed analysis of modern totalitarian legal theories may, then, be offered. The common elements in all these theories must be emphasised, and actual totalitarian practice may be traced to the original theories. For instance, in discussing the negation of the rule of law in modern totalitarian States, it might be advisable to consider critically Plato's quest for absolute justice, of which the philosopher-king is the sole interpreter. Or the communist view of the "socialist legality," of law as a weapon in the hands of an enlightened minority, has a parallel in Plato's final acceptance of law in the "second best state" as a convenient instrument rather than as a rule binding rulers and ruled alike. Conversely, when discussing the individual as the object of the legal order, Aristotle's choice of the rule of law as against discretion may provide the basis of the discussion. Other thinkers, like Rousseau and Kant, may be usefully referred to in this section, which should conclude with the neo-naturalistic post-war trend, especially in Germany, and the attempts of the modern State to preserve the rule of law as a principle consistent with increasing administrative activity.

Little can be usefully said here in connection with the two remaining sections, as these are on traditional lines. Section three considers the sociological theories (starting with the historical school)[59] which appear to have as their aim the analysis of actual law in terms of social forces, such as the American sociological school or the *Interessenjurisprudenz*, rather than the achievement of a particular type of society. Finally, section four is concerned with a study of religion in its two aspects, first, as providing an authority superior to positive law, and here several traditional natural law theories may be considered, and secondly, as a social force which helps to shape positive law.

[58] I have dealt with this aspect in detail in my article in the *Archives de Philosophie de Droit*, see *supra*, n. 53.

[59] I agree, with respect, with Stone, who prefaces his discussion of the Sociological school with an account of the Historical school, see *op. cit.*, pp. 35 and 421 *et seq.* On the other hand Stone deals with "Law and Justice" as a separate branch of jurisprudence, *ibid.*, pp. 215–377.

Conclusion

The question posed in this article was "What is natural law?" It has been submitted that this question, although currently avoided or criticised, may still be of some value to lawyers. Modern textbooks still consider natural law ideas, and in other countries a great deal of work is being done in that field. It may be that the historical method of teaching natural law in this country accounts for its neglect. But the method of teaching cannot improve unless the meaning of natural law is established and its significance clearly appreciated.

It has been submitted that the meaning of natural law is twofold. First, it means the objective moral content of legal norms. In this sense it is, perhaps, more appropriate to speak, as Dr. Goodhart does, of the moral law rather than of natural law. It is, in fact, doubtful whether this is what is normally understood as natural law, as Pound has suggested. However, natural law in this sense belongs to Analytical jurisprudence. If we are to analyse legal norms, recognise their validity and appreciate their nature, it is necessary to understand that legal norms are not abstract entities but have a moral content. Secondly, natural law also means ideal or universal law. In this sense there is no single natural law, but various theories which use the term as a convenient formula. It would, therefore, be of advantage if, instead of speaking generally of natural law, we were to group together those theories that have something in common. But to make these theories truly significant for the lawyer, we should not be concerned so much with the theories themselves; we should rather be concerned with the practical legal results that would follow, if any of these theories were to prevail. This task may be achieved in an objective manner, and the jurist's duty in this connection may be described as providing a plan for the different types of legal order that may emerge from the application of these theories. Thus, the need for a separate ethical jurisprudence is eliminated, and the relevant material may be considered within the framework of the Sociological school. Finally, a rearrangement of this school is suggested, which incorporates a great deal of traditional natural law, which is no longer treated in an abstract manner but in concrete terms of social interests. It is submitted that only in this way, although not necessarily by accepting the specific scheme proposed, natural law may recover the position it deserves in jurisprudence.

A. G. Chloros.*

* "Lecturer" in Law, University College of Wales, Aberystwyth.

PROTECTION OF MINORITIES AGAINST OPPRESSION UNDER SECTION 206 OF THE COMPANIES ACT, 1948

SECTION 206 of the Companies Act, 1948, provides that, where a compromise or arrangement is proposed between a company and its creditors and/or shareholders, the court may on application to it summon a meeting of the classes concerned and if a three-quarter majority in value of each class, voting in person or by proxy, approve the compromise or arrangement, and if the court also gives its sanction, the compromise or arrangement will bind all the members of each class.[1] Now clearly such a provision exposes the minority members of a particular class to possible oppression at the hands of the majority. The purpose, then, of this article is to examine the safeguards that exist to protect the minority against such a fate.

It is quite clear from the provisions of section 206 that the minority's real protection lies in the necessity of obtaining the court's sanction to any scheme brought under the section, and the court will withhold its consent in any of the three following circumstances:

(1) where the majority of each class have not acted bona fide in the interests of that class
(2) where the scheme of arrangement cannot be regarded as fair and reasonable and
(3) at the court's discretion, where the dissentient minority have not been granted the same right to be bought out as that enjoyed by dissentient shareholders under section 287.

We will consider each safeguard in turn, beginning with (1).

The first protection presents no difficulty and can easily be stated. "In exercising its power of sanction under [s. 206] the court will see . . . that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent."[2] Thus, no consent will be given if the majority have subordinated the interests of the class in question to those of another class of

[1] If a particular class has no interest in the arrangement, it will, of course, be unnecessary to obtain its approval: *Re Tea Corpn., Sorsbie* v. *Tea Corpn.* [1904] 1 Ch. 12 (C.A.).

[2] *Per* Astbury J. in *Re Anglo-Continental Supply Co.* [1922] 2 Ch. 723 at p. 736. See also Lindley L.J. in *Re Alabama, etc., Rail. Co.* [1891] 1 Ch. 213 (C.A.) at p. 239 and Lopes L.J. in *Re English, Scottish & Australian Chartered Bank* [1893] 3 Ch. 385 (C.A.) at pp. 414, 415.

which they are also members. For example, if the majority of the preference shareholders should happen to hold ordinary as well as preference shares and should decide to sacrifice the interests of the latter class in favour of the former, the court will withhold its sanction to the arrangement. In practice, however, this first protection will to a large extent be incorporated in the second one, which we must now consider.

No scheme of arrangement will receive the sanction of the court unless it be fair and reasonable. In the words of Fry L.J. in *Re Alabama, etc., Rail. Co.*[3]:

> "... the court ... must be satisfied that the proposal was at least so far fair and reasonable, as that an intelligent and honest man, who is a member of that class, and acting alone in respect of his interest as such a member, might approve of it."

Now, as intimated above, this second protection will in effect largely, though not entirely, embody the first. For in practice one of the easiest ways of proving mala fides in the majority is to show that the scheme is so glaringly unfair that no one could reasonably approve it, if he were acting in good faith. Admittedly it is possible to establish mala fides by proving that the scheme of arrangement, however reasonable outwardly, in fact conferred personal benefits on certain interests, *i.e.*, it was discriminatory in its effect. Nevertheless, the second protection will to a large extent embrace the first.[4]

We must now consider the value of this second protection. To do so, however, it is important to appreciate fully the criterion which will be adopted by the court in determining whether a particular scheme is fair and reasonable. The court will sanction the scheme if it takes the view that a man of normal commercial prudence might reasonably regard the scheme as being fair and reasonable. It will be immaterial that the members of the court might, if they had to vote on the scheme personally, reject it as being unreasonable. They will not apply their own personal views.[5]

[3] [1891] 1 Ch. 213 (C.A.) at p. 247. See also Bowen L.J. in the same case at p. 243; Lopes L.J. in *Re English, Scottish & Australian Chartered Bank* [1893] 3 Ch. 385 (C.A.) at p. 415; Buckley J. in *Re Standard Exploration Co., The Times*, March 21 and 26, 1902; Astbury J. in *Re Anglo-Continental Supply Co.* [1922] 2 Ch. 723 at p. 736; Maugham J. in *Re Dorman, Long & Co.* [1934] Ch. 635 at p. 657.

[4] However, the converse does not apply. The fact that a scheme is not fair and reasonable will not necessarily prove mala fides on the part of the majority. The court is reluctant to import lack of good faith, except where it is most glaringly revealed. (*Cf. Brown* v. *British Abrasive Wheel Co.* [1919] 1 Ch. 290.)

[5] See Lord Maugham in *Carruth* v. *Imperial Chemical Industries* [1937] A.C. 707 (H.L.) at p. 770 and Lindley L.J. in *Re English, Scottish & Australian Chartered Bank* [1893] 3 Ch. 385 (C.A.) at p. 409. See also Buckley J. in *Re Standard Exploration Co., The Times*, March 21 and 26, 1902, and *cf.* Lord Loreburn L.C. in *Poole* v. *National Bank of China, Ltd.* [1907] A.C. 229 at p. 236.

So long as the scheme is one which the court believes a businessman might reasonably accept, the sanction of the court will be given.

Admittedly, there is a dictum which suggests a different criterion. For, in *Re Alabama, etc., Rail Co.*[6] Lindley L.J. lays it down that the court may withhold its sanction, if an objection might reasonably be lodged against the scheme. He said[7]:

> "The court must look at the scheme and see . . . whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such an objection to it as that any reasonable man might say that he could not approve of it."

If this be the correct criterion, the protection afforded the minority is strengthened immensely. All that the minority have to do to kill a scheme of arrangement is to satisfy the court that their objection is one which a businessman might reasonably entertain. This is a far cry from having to establish that the scheme is one which no reasonable man of business could regard as being in the interests of the class concerned. However, as was pointed out by Maugham J. in *Re Dorman, Long & Co.*,[8] the dictum cannot "represent exactly what the Lord Justice intended." For in *Re Alabama, etc., Rail. Co.*[6] Lindley L.J. clearly approved of the dicta of Bowen and Fry L.JJ. who sat with him on the case and expressed the conventional view of the criterion which the court must adopt. Further, in all the subsequent cases the dicta there expressed have supported the view contended for above. It is submitted, then, that it is best to disregard Lindley L.J.'s dictum.

As an immediate outcome of the criterion adopted by the court in determining whether it will sanction a scheme of arrangement, the burden of proof must fall on the minority members. The mere fact that a scheme has received the support of the statutory majority in itself provides evidence that the scheme is fair and reasonable. The court will not interfere in commercial matters more than it can possibly help. Prima facie businessmen are best judges of what is fair and reasonable. Therefore, where a scheme has received the approval of the appropriate majority, the court will give its sanction, unless the minority can show that the scheme is not fair and reasonable by the standard which the court has to adopt in deciding these matters.[9]

We see, then, that, although the minority members of a class receive protection against abuse of the powers conferred on the majority under section 206 by the fact that the court will refuse its consent to a scheme of arrangement if it be not "fair and reasonable," the effect of the protection is greatly impaired in that

[6] [1891] 1 Ch. 213 (C.A.)
[7] At p. 239.
[8] [1934] Ch. 635 at p. 656.
[9] See Lord Maugham in *Carruth* v. *Imperial Chemical Industries* [1937] A.C. 707 (H.L.) at pp. 769, 770. *Cf.* Maugham J. in *Re Hoare & Co.* (1933) 150 L.T. 374 at p. 375; and Wynn-Parry J. in *Re Press Caps* [1949] Ch. 434 (C.A.) at p. 446.

(i) the court will not consider the scheme in the light of its own independent judgment, but will automatically sanction it, if it holds that a sensible businessman might reasonably approve it, and (ii) the burden of proving that the scheme is unfair and unreasonable rests on the minority who make the allegation. It requires little imagination to see that so far the protection afforded the minority by the necessity for the court's sanction is largely illusory. The minority are only safeguarded against the most flagrant instances of oppression. It is so easy to give a commercial reason which will satisfy the court that a sensible businessman might reasonably approve the scheme. The criterion adopted by the court weighs heavily against the minority, and, in addition to this, it is the minority who must bear the burden of proof. Further, it is a very significant point that, although there have been numerous cases where the minority have pleaded the unfairness of a scheme of arrangement whose validity depended on the sanction of the court whether under section 206 or section 66, in no instance did the minority succeed in convincing the court.

We now come to the third safeguard afforded the minority against oppression at the hands of the majority under section 206. The court may, if it thinks fit, make it a condition of its sanction to a scheme of arrangement that the dissentient minority shall have the same right to be bought out as that enjoyed by dissentient shareholders under section 287.[10] Thus, in *Re Sandwell Park Colliery Co.*[11] the court sanctioned a scheme under section 120 of the 1908 Companies Act (corresponding to section 206 of the present Act) only because the scheme had been specially amended so as to confer on dissentient members the express right to be bought out [12] and the company had in addition given an undertaking that non-assenting creditors would be paid out in full.

However, the court will not automatically give the dissentient minority the right to be bought out on the conditions set out in section 287. The court will exercise its discretion in the matter. Thus, in *Re Standard Exploration Co.*[13] the court sanctioned a scheme without conditions, Buckley J. observing that " a dissentient shareholder was not offered the arbitration which he could insist on if the reconstruction was under section 161 of the Companies Act, 1862 [now s. 287 of the present Act]. Under the scheme he would only get what the shares in the new company, which he might have taken, sold for. That was not unfair."

[10] s. 287 provides that a member of a company shall have the right to be bought out if he does not agree to the transfer under the section of the company's assets to another company in exchange for shares, etc., to be distributed among the members.

[11] [1914] 1 Ch. 589.

[12] *Cf.* also *Re Canning Jarrah Timber Co.* (*Western Australia*) [1900] 1 Ch. 708 (C.A.) and *Re Needhams* [1923] W.N. 289.

[13] *The Times*, March 21 and 26, 1902.

It will be seen from what has been said above that a minority shareholder is not so well protected where a scheme is formulated under section 206 rather than section 287. Whereas under section 206 the court may require, as a condition of its sanction, that the dissentients shall have the right to be bought out at a price agreed between the parties or decided on arbitration, it will not necessarily impose this condition. Under section 287, however, a dissenting shareholder has an absolute right to be bought out, a right which does not depend on the discretion of the court. Clearly, then, a dissentient member is better protected if a scheme is formulated under section 287 than he is if it is effected under section 206. A problem at once arises out of this conclusion. Section 206 is wide in scope, whereas section 287 is narrow. The former section is concerned with compromises and arrangements generally, whilst the latter deals with the sale of assets of one company to another, in exchange for cash shares, policies and other like interests for distribution among the members of the transferor company. Now might not a scheme properly falling within the scope of section 287 be brought instead under section 206? If it could, clearly the value of the protection given to the dissenting members under section 287 would be lessened. For the dissentients would have to depend on the discretion of the court for their protection. It is, therefore, a very vital question to decide whether a scheme falling within section 287 can be effected under section 206 instead. Unfortunately the answer to this problem is not free from difficulty. It is best if we first examine very briefly in their chronological order those cases where assets of one company were transferred to another for shares, etc., and then attempt to formulate a rule.

First, there are several unreported cases cited in Palmer's *Company Precedents*, 11th ed., Pt. II, pp. 1015 and 1038 where schemes involving the transfer of assets from one company to another in exchange for shares to be distributed among the members of the transferor company were not brought under section 161 [14] of the 1862 Act, but nevertheless received the sanction of the court. Such cases inevitably raise the question—by what authority did the court sanction the schemes? For until the Companies Act, 1900, such schemes could not be effected at all except under section 161. Of course, under the Joint Stock Companies Arrangement Act, 1870, s. 2, the court might sanction arrangements between the company and its creditors. However, such a power had no relevance to arrangements between the company and its members. It is submitted, then, that in these unreported cases occurring before the operation of the Companies Act, 1900, the court had no power to sanction arrangements between the shareholders and the company so as to bind dissentients, and that such schemes ought to have been brought under section 161.

[14] Now s. 287 of the 1948 Act.

The first reported case is *Re Canning Jarrah Timber Co. (Western Australia)*,[15] where the court sanctioned a scheme of arrangement brought under the Joint Stock Companies Arrangement Act, 1870, on the understanding that the dissentient shareholders should have the statutory rights enjoyed under section 161 of the Companies Act, 1862. However, this case is subject to the same criticism that may be levelled at the earlier unreported cases. By what authority did the court sanction a scheme purporting to bind all the shareholders? Admittedly, the court had power under the 1870 Act to sanction the scheme insofar as it concerned the company's creditors, but it had no power to impose an arrangement on shareholders. It is submitted, therefore, that the arrangement between the company and its members fell within section 161, and ought to have been brought under that section.

The next authority—*Re Standard Exploration Co.*[16]—occurred after the coming into operation of the Companies Act, 1900, and is, therefore, free from the difficulties encountered in the preceding cases. In it the court gave its sanction to a scheme of arrangement, though it did not require for the dissenting minority the rights given by section 161 of the 1862 Act. In 1904 another case arose—*Re Tea Corpn., Sorsbie* v. *Tea Corpn.*[17]—where a scheme of arrangement was effected under section 2 of the Arrangement Act, 1870, combined with section 24 of the Companies Act, 1900. Once again the court gave its sanction, holding that the ordinary shareholders had no right to require the safeguards afforded by section 161 to be inserted in the scheme, in that on a realisation of the company's assets there would be nothing for the ordinary shareholders anyway. The ordinary shareholders had nothing to gain from any such provision in the scheme. The next case—*Re General Motor Cab Co.*[18]—has, as will be shown later, caused considerable difficulty. Here the court refused to sanction a scheme brought under section 120 [19] of the Companies (Consolidation) Act, 1908, because, according to subsequent interpretation of the case by Astbury J. in *Re Sandwell Park Colliery Co.*[20] and counsel in *Re Needhams* [21] whose submission was apparently adopted by Tomlin J., there was no provision for preserving the rights of dissentient shareholders.[22] The court was laying down the rule that, where a scheme involving a sale under section 192 [23] was brought

15 [1900] 1 Ch. 708 (C.A.).
16 *The Times*, March 21 and 26, 1902.
17 [1904] 1 Ch. 12 (C.A.).
18 [1913] 1 Ch. 377 (C.A.).
19 Now s. 206 of the 1948 Act.
20 [1914] 1 Ch. 589.
21 [1923] W.N. 289.
22 "I think the judgments in *Re General Motor Cab Co.* must be read with reference to the particular scheme there which compelled shareholders to accept shares in the new company without giving them the rights of dissentients": *per* Astbury J. in *Re Sandwell Park Colliery Co., supra*, at p. 594.
23 Now s. 287.

under section 120, the court would only give its sanction if dissenting members were afforded the same rights as they would have enjoyed had the scheme been proceeded with under section 192. However, a careful reading of the judgment shows that such an interpretation cannot stand. The court merely said that the scheme it was asked to sanction was not an arrangement within the meaning of section 120, but was simply a sale of the company's assets to another company for shares, which fell within section 192. The scheme could not, therefore, be brought under section 120, and as a result the court must withhold its sanction.[24]

The next case to arise was *Re Sandwell Park Colliery Co.*[20] Here Astbury J. sanctioned a scheme involving the transfer of assets from one company to another, but only because the scheme conferred on the dissenting members the protection they would have enjoyed under section 192. But far and away the most important case on the problem whether a scheme falling within section 287 can be brought under section 206 is to be found in *Re Anglo-Continental Supply Co.*[25] where the same learned judge considered the whole question at considerable length. It was argued before him that, where there was a scheme involving a sale of a company's assets to another company in exchange for shares, the scheme must be brought under section 192. Astbury J., however, rejected this contention as being far too wide, and accepted as a true statement of the law three propositions formulated by counsel. The relevant part of his judgment[26] is set out below, section 192 corresponding, of course, to section 287 of the 1948 Act and section 120 to section 206:

> "As a result of his researches Mr. Maugham has formulated three propositions which, when expressed as follows, are in my judgment sound: (1) when a so-called scheme is really and truly a sale, etc., under section 192 *simpliciter*, that section must be complied with and cannot be evaded by calling it a scheme of arrangement under section 120; see *per* Warrington L.J. in *Re Guardian Assurance Co.*[27] (2) Where a scheme of arrangement cannot be carried through under section 192, though it involves (*inter alia*) a sale to a company within that section for 'shares, policies and other like interests,' and for liquidation and distribution of the proceeds, the court can sanction it under section 120 if it is fair and reasonable in accordance with the principle upon which the court acts in these cases, and it may, but only if it thinks fit, insist as a

[24] Although this interpretation was considered but rejected in *Re Sandwell Park Colliery Co.*, *supra*, it was nevertheless supported by Warrington L.J. in *Re Guardian Assurance Co.* [1917] 1 Ch. 431 (C.A.) where he observed *obiter* at p. 450: "In [*Re General Motor Cab Co.*] there was an attempt by means of what was called an arrangement between the company and its shareholders to do that which the Act only permitted to be done in another way."

[25] [1922] 2 Ch. 723.

[26] See pp. 734, 735.

[27] [1917] 1 Ch. 431 (C.A.).

> term of its sanction on the dissentient shareholders being protected in manner similar to that provided for in section 192. (3) Where a scheme of arrangement is one outside section 192 entirely, the court can also and *a fortiori* act as in proposition (2), subject to the conditions therein mentioned."

Although these three propositions are eminently reasonable, it is difficult to accept in full the explanation which Astbury J. went on to give of the various cases on which he founded his three rules. Let us consider each proposition in turn.

In support of the first, Astbury J. cited *Re General Motor Cab Co.*[28] As has been shown above, the reasoning of the judgment in this case undoubtedly supports Astbury J.'s first conclusion. The learned Lord Justices held that the scheme was not an arrangement within the meaning of section 120, but simply a sale of the company's assets to another company for shares, which fell within section 192. However, the particular facts of the case give rise to considerable difficulty. For this was not a case of a transfer under section 192 *simpliciter*. There was in fact an arrangement between the two classes of members as to how the fully-paid shares to be received should be distributed among them. To quote the actual words of Buckley L.J.[29]:

> "This transaction is one under which its preferred fully-paid ordinary shares of £4 are to be replaced by shares of 1s. and four of its fully-paid deferred shares of 1s. by a share of 1s. The result is that £822,880 11s. is represented in the new company by a sum of not more than £10,000."

The proposed distribution was not in strict accordance with the rights of each class, but was the subject of a scheme of arrangement agreed to by both classes. Admittedly, the learned Lord Justice expressly denied that there was an arrangement, his reason being that the scheme did not amount to a compromise.[30] However, it has been expressly laid down by the Court of Appeal in *Re Guardian Assurance Co.*[31] that an "arrangement" need not be analogous to a "compromise," and therefore the scheme in the *General Motor Cab* case[32] which regulated the distribution of shares otherwise than in accordance with the strict rights of each class clearly amounted to an arrangement within the meaning of section 206. This was not a case of a transfer *simpliciter* of assets to a company in exchange for shares, etc. It is submitted, then, that the decision in *Re General Motor Cab Co.*[32] is not an authority for the first of Astbury J.'s three propositions. Further, as regards the dictum of Warrington L.J. in *Re Guardian Assurance Co.*[31] also cited by Astbury J., it is submitted that the learned Lord Justice was under

[28] [1913] 1 Ch. 377 (C.A.).
[29] At p. 383.
[30] At p. 384.
[31] [1917] 1 Ch. 431 (C.A.).
[32] [1913] 1 Ch. 377 (C.A.).

the misapprehension that there was no arrangement in the *General Motor Cab* case.[32] This mistaken belief undermines the value of the dictum. It is submitted, therefore, that the authorities cited by Astbury J. do not adequately bear out his first proposition.

Indeed, there are authorities which run directly counter to the proposition. Thus, as has been explained above, the scheme of arrangement between the shareholders and the company in *Re Canning Jarrah Timber Co. (Western Australia)* [33] was not brought under section 161. Even if we skate over the question of what authority the court had to sanction the scheme so as to bind the dissentients, the case is still not free from difficulty. As there was only one class of shareholder, there was nothing to prevent the scheme being effected under section 161. This was simply a sale of the company's assets to another company in exchange for shares which were to be distributed among the members in strict accordance with their rights. Similarly, in *Re Standard Exploration Co.*,[34] where the court sanctioned an arrangement between the company and its shareholders so as to bind the dissentients, as there was (it would seem) only one class of shareholder we have purely a sale falling within section 161. According to Astbury J.'s rule the scheme ought to have been brought under section 161. Thus, we have two authorities which directly conflict with Astbury J.'s first proposition, and suggest that the court has power to sanction under section 206 schemes which are simply sales falling within section 287.

Let us now turn to the second proposition. If a scheme is brought under section 287, the proceeds of sale must be distributed among the members of the transferor company in exact accordance with their rights on a winding up. Where, then, there is more than one class of shares, considerable difficulty may arise. For example, suppose there are both preference and ordinary shareholders, and a scheme is proposed under section 287. In providing under the scheme for the distribution of the shares of the transferee company to the members of the transferor company, reference can only be had to their rights on a winding up, not to the market value of the shares. Of course, the strict rules of distribution can be varied if all the members agree. But, it is extremely difficult—particularly where a large number of members are concerned—to ensure that they all agree without a single dissent. Fortunately, however, this problem does not occur in an arrangement under section 206. In fact, the real object of this section is to enable the various classes of shareholders to vary their strict rights. Therefore, if a company wishes to effect a reconstruction involving (i) the transfer of its assets to another company in exchange for shares and (ii) the distribution of the shares otherwise than in strict accordance with the rights of the members of the old company

[33] [1900] 1 Ch. 708 (C.A.).
[34] *The Times*, March 21 and 26, 1902.

on a winding up, it must have recourse to section 206. Now, in such circumstances, according to the second proposition laid down by Astbury J., a scheme of arrangement may properly be brought under section 206, the court being left to decide whether or no it will insist on the insertion in the scheme of a provision conferring on the dissentient members the safeguards set out in section 287.

In support of this second proposition Astbury J. cited *Re Sandwell Park Colliery Co.*[35] and *Re Standard Exploration Co.*[36] The scheme in the former case was, in fact, brought under section 120, though it involved a transfer of assets to another company. Had the scheme been effected under section 192, where the distribution of the shares in the new company would have had to have been in strict accordance with the rights of the members of the old company, it was possible that the preference shareholders might have claimed more than the scheme of arrangement allowed. The scheme, therefore, had to be brought under section 120. It was not one which amounted merely to a sale *simpliciter* of the company's assets to another company in exchange for shares, etc. The scheme involved a transfer of assets falling within section 192, but it could not be brought under that section because it was desired to distribute the shares in a manner which could not be challenged by any class. Consequently, the scheme was brought under section 120, and it was sanctioned by the court. Astbury J. therefore finds support for his second proposition in the decision of *Re Sandwell Park Colliery Co.*[35] However, although the decision of the *Sandwell Park Colliery* case[35] can be regarded as supporting Astbury J.'s second proposition, it is difficult to see how the reasoning of the judgment can be interpreted in the same light. It would seem that the learned judge in this case—who was in fact Astbury J. himself—gave his sanction to the scheme, not because it involved an arrangement falling outside the narrow confines of section 192, but merely because the dissenting minority enjoyed under the scheme the protection afforded by that section and the company had agreed to satisfy all creditors before executing the scheme.

A second case specifically cited by Astbury J. in support of his second proposition was *Re Standard Exploration Co.*[36] However, what evidence is there that there was even an arrangement in this case necessarily falling within section 120? As has been submitted above, surely there was simply a transfer of assets from one company to another in exchange for shares, which according to Astbury J.'s first proposition must be dealt with under section 192! Indeed, the fact that the court gave its sanction to the scheme being brought under the Joint Stock Companies Arrangement Act, 1870 (in conjunction presumably with section 24 of the Companies Act, 1900), serves as an authority against the first proposition discussed above. It is submitted, then, that neither

[35] [1914] 1 Ch. 589.
[36] *The Times*, March 21 and 26, 1902.

Re Sandwell Park Colliery Co.[37] nor *Re Standard Exploration Co.*,[38] though expressly cited by Astbury J., is a satisfactory authority for the second proposition. In the light of the facts the decision in the former cases lend support, but not so the reasoning which led to the decision, whilst in the latter case it was unnecessary to bring the scheme under section 120 at all. Further, the *General Motor Cab* case[39] is an express authority against the proposition. In that case there was a scheme of arrangement falling within section 120 which could not be brought under section 192, because the proposed distribution would not be in strict accordance with the rights of the members of the transferor company. Nevertheless, the court refused to sanction the scheme, holding it fell within section 192.

However, support can be found for Astbury J.'s second proposition in the case of *Re Tea Corpn., Sorsbie* v. *Tea Corpn.*,[40] which was mentioned by the learned judge, but not specifically cited to substantiate his rule. Here a scheme involving the transfer of a company's assets to another company in exchange for shares was brought under section 2 of the Joint Stock Companies Arrangement Act, 1870, combined with section 24 of the Companies Act, 1900, and it was argued that the scheme ought to have been brought under section 161 of the Companies Act, 1862. However, it is quite clear from an examination of the details of the scheme that it could not have been affected under section 161. For the shares in the new company were to be distributed otherwise than in accordance with the strict rights of the members of the transferor company. The court in fact exercised jurisdiction under section 24 of the Companies Act, 1900, and it can, therefore, be argued that the *Tea Corpn.* case[40] is a clear authority for Astbury J.'s second proposition. However, although the case admits of this interpretation, it would appear that the members of the court did not decide it on this basis. They justified sanctioning the scheme under section 24 of the Companies Act, 1900, on the ground that the ordinary shareholders (who were the objecting class) had nothing to gain by requiring the scheme to be brought under section 161. For on a sale of the company's assets the ordinary shareholders would receive nothing, and therefore the right to be bought out, which was enjoyed under section 161, would be valueless to the ordinary shareholders. It is interesting to contemplate what would have been the reasoning of the court had certain preference, and not ordinary, shareholders objected to the scheme. Clearly, they had something to gain on a sale of the company's assets. Assuming the court would still have sanctioned the scheme under section 24, it is submitted that the decision would

[37] [1914] 1 Ch. 589.
[38] *The Times*, March 21 and 26, 1902.
[39] [1913] 1 Ch. 377 (C.A.).
[40] [1904] 1 Ch. 12 (C.A.).

have had to have been based on the principle set out in Astbury J.'s second proposition.

We see, then, that it is not easy to find authority in the cases for Astbury J.'s second proposition. Admittedly, the decisions in *Re Sandwell Park Colliery Co.*[41] and *Re Tea Corpn., Sorsbie* v. *Tea Corpn.*[42] can be cited in support of the learned judge's rule, but not so the reasoning which in each case gave rise to the decisions. Further, although Astbury J. expressly cited *Re Standard Exploration Co.*[43] to justify his proposition, it is submitted that on the facts of the case it was quite unnecessary ever to have brought the scheme under section 120 at all. Finally, the *General Motor Cab Co.*[44] is an express authority against the principle under discussion. We see, then, that however reasonable Astbury J.'s second proposition may seem, judicial support for it is not strong.

As regards the third proposition, no difficulty arises. It is really a statement of the obvious. Thus, it was held in *Re Anglo-Continental Supply Co.*[45] that a scheme involving the transfer of a company's assets to a new foreign company in exchange for shares in the latter was quite outside the scope of section 192 of the Companies (Consolidation) Act, 1908, and therefore could properly be brought under section 120. Indeed it is difficult to see how any other conclusion could be seriously entertained.

Now that we have considered Astbury J.'s three propositions at some length, one point stands out most vividly. Any objective examination of the authorities before *Re Anglo-Continental Supply Co.*[46] reveals the law to be devoid of any consistent principle. The supreme merit of the three rules propounded by Astbury J. is that they give order to a hitherto chaotic position. Clearly, section 287 of the present Act (and the corresponding section of earlier Acts) was intended to have some effect, and if its functions are taken over completely by section 206, it will be meaningless. Astbury J.'s three rules give a point to section 287. Prima facie the transfer of one company's assets to another in exchange for shares must be effected under section 287 with its attendant safeguards for dissentient shareholders. It is only where section 287 is an unsatisfactory section under which to bring a scheme involving such a transfer (because, for example, the shares are to be distributed otherwise than in strict accordance with the rights of the shareholders of the transferor company) that recourse can be had to section 206. Under Astbury J.'s interpretation of the law a clear line of demarcation is made between the scope of section 287 and that of section 206.

[41] [1914] 1 Ch. 589.
[42] [1904] 1 Ch. 12 (C.A.).
[43] *The Times*, March 21 and 26, 1902.
[44] [1913] 1 Ch. 377 (C.A.).
[45] [1922] 2 Ch. 723.
[46] *Ibid.*

However, despite the fundamental reasonableness of Astbury J.'s three propositions, it is somewhat surprising to note that they appear not to have been adopted by counsel for the petitioner in *Re Needhams*,[47] the one subsequently reported case concerning a scheme brought under the earlier equivalent of section 206 and involving a transfer of assets to another company and a distribution of its shares. For here counsel argued [48]—"The court is asked to sanction the scheme under section 120 of the Companies (Consolidation) Act, 1908. There is jurisdiction to do so if proper provision is made for dissentient shareholders: *Re Sandwell Park Colliery Co.*[49] . . . The effect of *Re General Motor Cab Co.*[50] is that the court will not sanction such an arrangement unless the dissentient shareholders are given at least as good rights as under section 192"—and the court did not deny this contention despite the fact that it ran directly counter to the carefully weighed opinion of Astbury J. and the principle clearly established to the contrary in *Re Standard Exploration Co.*[51] However, as the only thing the court was actually required to decide was whether it would sanction a particular scheme which happened to confer upon dissentients the same right of being bought out as that contained in section 192, the court's finding in favour of the petitioner did not imply that it necessarily endorsed counsel's view that it could not have given its sanction had the right conferred by section 192 not been granted under the scheme. But whatever the significance of *Re Needhams* [52] it is submitted that it is a hopeless task to reconcile authorities which were never based on consistent principles and, hence, are in hopeless confusion, that Astbury J.'s three propositions represent a courageous attempt to give order to a chaotic situation, and that they should be adopted. The position can, of course, only be finally resolved in the light of future cases.

Returning, then, to the problem we set out to consider, namely, what protection the minority shareholders have against oppression at the hands of the majority under section 206, we see that three safeguards are provided. First, the court will not give to a scheme brought under section 206 the necessary sanction to make it effective, unless the majority have acted bona fide in the interests of the class as a whole. Secondly, the court will only sanction the scheme if it be a fair and reasonable one. However, it is submitted that the first protection is in effect incorporated to a large extent in the second, and that in practice it is difficult for the minority to prove the unfairness of a scheme. Thirdly, the court may require as a condition of its consent that the dissentients shall have the

47 [1923] W.N. 289.
48 Without, however, making any reference to *Re Anglo-Continental Supply Co.*, *supra*.
49 [1914] 1 Ch. 589.
50 [1913] 1 Ch. 377 (C.A.).
51 *The Times*, March 21 and 26, 1902.
52 [1923] W.N. 289.

rights they would have enjoyed had the scheme been brought under section 287. It is emphasised, however, that whether or no the dissentients shall have the right to be bought out lies entirely within the discretion of the court. Nevertheless, the authorities show that, where at any rate a scheme involves a transfer of assets and a distribution of shares, the court usually confers the right, so that this third protection is of some real significance. Arising directly out of this third protection is the problem whether a scheme properly falling within section 287, where the dissentient minority have an absolute right to be bought out, can be brought under section 206, where they enjoy no such right unless it is expressly conferred by the court as a condition of its sanctioning the scheme. The authorities on this point are confused and irreconcilable, but it is submitted that the three propositions laid down by Astbury J. are eminently reasonable and should be adopted.

D. G. Rice.*

* M.A., LL.B.(Cantab), PH.D.(Lond.), of Lincoln's Inn, Barrister-at-Law.

FRUSTRATION AND THE CHATTEL INTEREST

THERE is no consensus of opinion among the heads of the law in England on the rule that frustration applies to leases. In the Court of Appeal it was first questioned by Atkin L.J. (as he then was) in his minority judgment in *Matthey* v. *Curling*.[1] In the House of Lords, however, Lord Simon and Lord Wright held *obiter* in the *Cricklewood* case [2] that there was no reason why frustration should not apply to leaseholds.

But in the Court of Appeal the rule that frustration does not apply to leases is still law and its *raison d'être* is the subsistence of the so-called chattel interest, also known as "term of years," created by the lease.

In *London & Northern Estates, Ltd.* v. *Schlesinger* [3] Lush J. said:

> It is not correct to speak of this tenancy agreement as a contract and nothing more. A term of years was created by it and vested in the appellant, and I can see no reason for saying that because this order disqualifies him from personally residing in the flat, it affected the chattel interest which was vested in him by virtue of the agreement. In my opinion it continues vested in him still.

There is no question that Lush J. uses the phrases "term of years" and "chattel interest" to convey an estate in the land incidental to the lease—an interest of a secondary character subject to the lease and following its—the lease's—destiny: it is a creature of the lease. In his speech in the *Cricklewood* case, Lord Wright treats it as such.[4] In the same case Lord Russell says [5]:

> A lease may come to an end, and with it the estate in the land and all contractual liability, by virtue of some provision in the lease, or by reason of some defect in the title of the person who purported to grant it.

It follows that the chattel interest is not indefeasible: the lessee may contract out of it by express stipulation. One is reminded of the words in *Paradine* v. *Jane*,[6] that the lessee "could provide against it by his contract," *i.e.*, against his obligation to pay rent or repair.

1 [1922] 2 A.C. 180.
2 *Cricklewood Property & Investment Trust, Ltd.* v. *Leighton's Investment Trust, Ltd.* [1945] A.C. 221.
3 [1916] 1 K.B. 20, at 24.
4 [1945] A.C., at 240.
5 *Ibid.*, at 234.
6 (1647) Aleyn. 26.

But in the same case (*Cricklewood, supra*) Lord Goddard says [7]:

> In the case of a lease, the foundation of the agreement is that the landlord parts with his interest in the demised property for a term of years, which thereupon becomes vested in the tenant, in return for a rent. So long as the interest remains in the tenant, there is no frustration, though particular use may be prevented. . . . It is no doubt easy to envisage a hard case: building lessees may find soon after a lease has been granted, that a statute is passed prohibiting building on the land in perpetuity . . . in such cases hardship would result but not greater than if they had purchased the fee simple of the building estate, which subsequent legislation prevented them from developing. . . .

Here the transaction assumes a different aspect altogether: what, in Lord Goddard's view, is conveyed is not a mere estate in the land which falls with the lease, but the landlord's own interest "in the demised property . . . which thereupon becomes vested in the tenant . . ." as finally and irrevocably "as if he had purchased the fee simple" thereof, for this is "the foundation of the agreement." There is no possibility of providing against it in the agreement. Here the chattel interest is erected into the fee simple, which by its very nature does not fall with the lease as a contract, but continues vested in the tenant whatever may befall the property during the term of the lease. An interest of this kind would surely survive frustration. If that is really so, the usual covenants in leases such as absolute or qualified covenants as to assignment and subletting should disappear, for the transfer of such interest with such limitations, apart from involving a contradiction in terms, would impose on the tenant risks and liabilities which, on the happening of certain events, would deprive him of his right to quiet enjoyment without relieving him from any of his obligations under the lease.

But Lord Goddard's view would not appear to be in harmony with the history of leaseholds. Holdsworth (in Volume 3 of his *History of English Law* [8]) uses the term chattel interest to denominate a class of rights: not only is a lease for years a chattel interest (p. 216) but the right of a creditor under the enactment of 1285 to hold the land of his debtor until the debt is paid is also described as a chattel interest (p. 131), which in the particular context would amount to a mere right of detainer. Professor Cheshire in his *Modern Law of Property* [9] assigns the chattel interest to the class of chattels real and gives reasons therefor which, if Lord Goddard's view prevails, would defeat their own ends. There is a difference in kind between the views held by Lords Wright and Russell and the view of Lord Goddard as to the very nature of the chattel interest.

[7] At 245.
[8] (5th ed.) pp. 131, 216.
[9] (8th ed.), pp. 36 *et seq.*

Again, in his article "The Coronation Cases," [10] Dr. Glanville Williams explains that the consideration for the tenant's covenant to pay rent is the grant by the landlord of "an" interest in the land, and that so long as that interest remains undefeated by eviction by the landlord or by title paramount, the consideration is performed and rent must be paid. In the next paragraph, however, Dr. Williams finds this theory unsatisfactory and the right *in rem* conferred on the lessee artificial, *i.e.*, more or less illusory. No alternative explanation is offered and we are left with what appears to be a legal concept to which no satisfactory explanation, apparently, can be given. With the divergence of opinion referred to above, no wonder that the term "chattel interest" offers resistance to conceptual definition as a specific right. However, the view that the chattel interest is an appendant to and not the foundation of a lease clearly emerges from the above discussion.

Starting from this standpoint, and postulating as an overriding consideration that the fundamental element in the lease is the demise—the covenant for quiet enjoyment—it may be laid down that inability or impossibility of securing the effect of this covenant without the lessee's fault must necessarily involve the negation of the payment of rent and therewith the disappearance of the chattel interest.

In *Paradine* v. *Jane*, a tenant was dispossessed by the King's enemies of the demised premises. His landlord sued him for rent due since his dispossession and recovered judgment on the ground that his undertaking to pay rent was absolute. It is submitted that the facts of this case, disclosing an incident of such public character, did not admit of determination by reference to the provisions of any consensual instrument. The lessee was dispossessed by a process which, at least as far as he was concerned, overran the very power of the State which, in the last resort, conditions and supports law itself and, as such, transcends eviction by the landlord or by title paramount. The same considerations apply to the exercise of emergency statutory powers, although in their case it is the competent national authorities within the realm who are authorised to exercise transcendental powers similar in nature to those of an invading army. In *Matthey* v. *Curling* it was held that requisition under those powers did not amount to eviction by the landlord or by title paramount. It is submitted that if the powers under which such requisitions are made override, as they do, private rights, they are stronger than eviction by either landlord or title paramount, because neither of these can preclude or resist the exercise of those powers for the purpose of securing the fulfilment of their covenant for quiet enjoyment. The determining factor in these cases is not superiority of title but the urgent

[10] (1941) 4 M.L.R. 248, at 257.

and irresistible character of the action taken under those powers. Its effect in working frustration is determined by the degree of its interference and duration in defeating the purpose of the contract so far as it depends on the exercise of the private right affected by the requisition, and the chattel interest as an appendant of the lease vanishes with it. If, therefore, the frustrating event affects the use of the land during a negligible part of the period of the lease or of the unexpired portion thereof (as in the *Cricklewood* case) frustration does not apply. Neither is there frustration if, consistently with Lord Russell's view, the lease comes to an end under its own terms. But if the use of the land is or presumably may be affected during the whole of the term or of the unexpired period thereof, it is submitted that there is no reason for maintaining that frustration does not apply.

But requisition of leaseholds under statutory powers as a frustrating event reveals frustration in the light of a special case. Requisition *per se* without more would cause frustration, but the further statutory remedy of compensation wards it off and prevents it being set up. The position is not that frustration has occurred and is not applied because frustration does not apply to leases. It is eliminated by the effect of compensation arising immediately upon the cesser of the tenant's possession under the lease as a result of the requisition. In *Swift* v. *Macbean* [11] it was held that frustration did not apply, but that if it did, then the lease was frustrated. It is respectfully submitted that frustration did not take place because the statutory provision for compensation operated to continue the effect of the contract as a term incorporated therein. This has nothing to do with the much disputed theory of " the implied term " applied in cases of frustration. The statutory provision mentioned is incorporated in the lease in the way " Clauses Acts " incorporate terms in the instruments to which they relate, unless expressly excluded. The decision in *Swift* v. *Macbean* in its alternative form is inconsistent with both the intention of the legislature and the effect of legislation. If frustration applies and the lease is frustrated, a crop of questions arises to none of which an adequate answer is offered by the decision. In the first place, how is frustration made to apply when legislation was passed to prevent its incidence? In the second place, if frustration has occurred, is the statutory provision for compensation automatically cancelled and, if so, who is to bear the loss? Does compensation become automatically payable to the landlord? And do these automatic changes follow without statutory authority?

It would appear, under the circumstances, as though the chattel interest had been spirited away. This is not so. Its effect is to indicate the incidence of the risk, and is exhausted by the very fact that the compensation is made payable to the tenant. Under

[11] [1942] 1 K.B. 375.

Roman law hiring of land gave rise to simple personal obligations and its determination restored the land back to the owner with the result that the relation of landlord and tenant ceased. Requisition would have the effect of putting an end to that relation, with the result that compensation would become payable to the landlord. As already observed, in England the statutory provision operates to continue the contract and, therefore, the tenant receives the compensation, and the chattel interest is merged in the effect of that statutory provision.

Now, suppose that instead of the paddock in *Baily* v. *De Crespigny* [12] having been sold, it had been the subject of a lease, compulsory purchase by the railway company would have put an end to the lease otherwise than " by virtue of some provision in the lease or by reason of some defect in the title of the person who purported to grant it " (*per* Lord Russell in *Cricklewood, supra*, at 234). Compensation would be payable both to the tenant and to the landlord, regard being had to the length of the unexpired period of the lease term. The lease would be frustrated and the chattel interest would disappear with it. In this case it would become merged in the evaluation to the tenant of the length of the unexpired period. He could neither claim nor receive any special or separate compensation for the loss of the chattel interest. Nor could he do so where a " vast convulsion of nature swallowed up the property altogether or buried it in the depths of the sea " (*per* Lord Simon in *Cricklewood, supra*, at 229), in which case there would be no third party to neutralise the effect of the ensuing frustration.

In conclusion it appears that the chattel interest has no such decisive effect on leases in case of frustration as to prevent it applying thereto. The examples furnished show that it follows the destiny of the lease without claiming any separate independent existence, or showing any uniformly perceptible effect, or enjoying any distinct estimation assignable to itself apart from the lease. There is no reason, therefore, why it should operate to exclude leases from the ordinary consequences of frustration, except that it takes effect from the time it occurs, though this is not the effect of the chattel interest.

S. Yahuda.*

[12] (1869) L.R. 4 Q.B. 180.

* Advocate of the Israeli Bar.

LEGISLATION

Merchant Shipping (Liability of Shipowners and Others) Act, 1958

The Merchant Shipping (Liability of Shipowners and Others) Act, 1958, gives effect to the International Convention relating to the Limitation of the Liability of Owners of Seagoing Ships, signed in Brussels on October 10, 1957 (Cmnd. 353). The conference at which the Convention was negotiated also discussed two other conventions—one concerning the landing and maintenance of stowaways, and the other concerning liability to passengers—but neither came to fruition.

The efforts of the draftsman of the new Act, who recast the Convention in terms suitable for the statute, are evident, for example, from the following quotations. The Act says in section 1 (1): "the number by which the amount substituted by paragraph (*a*) of this subsection is to be multiplied shall be 300 in any case where the tonnage concerned is less than 300 tons." The Convention had expressed the rule thus (Art. 3 (5)): "For the purposes of ascertaining the limit of an owner's liability . . . the tonnage of a ship of less than 300 tons shall be deemed to be 300 tons."

The Act makes section 503 of the Merchant Shipping Act, 1894, as variously amended, conform with the Convention.

The most important change—which also received the greatest publicity at the time when conference proceedings were reported in the Press—relates to the calculation of the limited amount which a ship operator has to pay in damages. British law—the relevant Part of the 1894 Act was imperial in scope (see s. 509)—had provided that personal claims could be limited to £15 per ton and property claims to £8 per ton, amounts fixed over 100 years ago and long unduly favourable to the shipowner. In future, the figures will be 3,100 and 1,000 gold francs, respectively, one gold franc to be a unit of 65½ milligrams of gold of millesimal fineness 900 (s. 1 (1) and (2)). The Minister of Transport and Civil Aviation has power to specify sterling equivalents from time to time (s. 1 (3)), and he has done so by the Merchant Shipping (Limitation of Liability) (Sterling Equivalents) Order, 1958, the respective equivalents being £73 8s. 10-5/32d. and £23 13s. 9-27/32d.

The Convention also provides (Art. 3 (1) (c)) that where liability arises in respect of both personal and property claims, 2,100 out of the 3,100 gold francs per ton shall be appropriated to personal claims; where this does not satisfy the personal claimants, the latter shall share in the balance rateably with the property

claimants. The Act contains no express reference to this, and the Sterling Equivalents Order specifies no equivalent for 2,100 gold francs, but it can, of course, be calculated with the help of the two equivalents specified in the Order. British case-law before the 1958 Act provided for such "marshalling" of the limitation fund, laying down that in the event of mixed claims £7 per ton should be reserved for personal claimants (*The Victoria* (1888) 13 P.D. 125). It should be observed that the old and the new ratios vary; the old £7 is just under half, while the new 2,100 gold francs is about two-thirds of the total. The Convention (Art. 4) provides that "the rules relating to the . . . distribution of the limitation fund, if any . . . shall be governed by the national law of the State in which the fund is constituted." It seems clear that United Kingdom courts (ss. 10, 11) will apply the new ratio. The new Act compels them to appropriate 1,000 gold francs to property claimants, just as the old Act compelled them to appropriate £8 out of the £15 to them. The old ratio left £7 and the new Act leaves 2,100 gold francs for the exclusive use of the personal claimants.

A minor point worth mentioning is that for personal claims ships under 300 tons shall be deemed to be of 300 tons, thus increasing the liability of small ships for loss of life and personal injuries (s. 1 (1)). The Convention (Art. 3 (5)) lays this down also for property claims, but the Protocol to the Convention allows members to make alternative provision, and Britain has exercised this right.

The Convention has also removed a discrepancy between British and most other laws. The latter calculated the limitation fund by reference to the value of ship and freight, the old *fortune de mer* principle (*e.g.* s. 486 of the German Commercial Code). The British method of calculation, adopted in 1862, has now been generally accepted; it is clearly preferable because the value of ship and freight must needs vary considerably, with the result that the degree of compensation is made dependent on fortuitous circumstances.[1]

The next point concerns the person who is entitled to limit his liability. Legislation amending the 1894 Act, which confined the privilege to owners, had extended the right to charterers by demise, hirers and others. The new Act (s. 3 (1)) extends the privilege to "any charterer and any person interested in or in possession of the ship," and also to persons employed by any of the former

[1] The principal reason why the ship and freight basis was abandoned in the first place was, however, different. As Mr. Milner Gibson, then President of the Board of Trade, explained when moving the second reading of the Merchant Shipping Bill, 1862 (*Hansard*, series 3, vol. 165, p. 1933), the old law favoured the owner of an old and poorly-maintained ship and discriminated against the owner running a new and well-maintained vessel. Accordingly, the Merchant Shipping Committee had recommended £15 per ton as the measure for limitation.

(s. 3 (2)). Even under the old law limitation was possible in respect of uncompleted ships. This provision has been adapted to modern shipbuilding techniques, which include prefabrication, by including "part of a ship" (s. 4 (1)); this term may give rise to difficult problems of interpretation. For British ships the privilege has also been extended to ships "not yet" registered (s. 4 (2)), in other words, not to ships which need not be registered at all.

Ships arrested may be released on a "guarantee" being furnished. The release shall be ordered if the guarantee is furnished in the "relevant port," and this port is situated in a Convention country. The relevant port is the port of call after the casualty or the port of disembarkation or discharge (s. 5).

Persons and property not on board the ship which is liable in damages (s. 503 (1) (*c*) and (*d*)) have been redefined (s. 2 (1)), and crew on board or other employees of the ship at fault have been given an important additional right. If their contract of service is governed by a law other than that of the United Kingdom, and the proper law does not provide for limitation, they are entitled to full compensation; if the proper law fixes limitation at a higher rate than provided by United Kingdom law, claimants can rely on that higher limitation (s. 2 (4)).

The Convention deals only with limitation of liability (s. 503 of the 1894 Act), but the new Act also amends the provisions relating to exemption from liability (s. 502). Without this amendment an illogical distinction would have been introduced in English law. Previous British amending legislation had extended the meaning of "shipowner" uniformly in respect of exemption and limitation, and the 1958 Act follows this precedent (s. 8 (3)), so that now any charterer, not only a charterer by demise, can claim exemption in respect of fire and of loss of or damage to valuables. The new Act also extends the right of exemption to non-seagoing ships (s. 8 (1)).

Finally, attention should be drawn to a few points in the Convention, which have not been expressly included in the 1958 Act. The owner can set off against the claimant any claim against the latter arising out of the same occurrence (Art. 1 (5)); this right has long been part of general English law. The burden of proof whether or not the shipowner himself was at fault or privy to the occurrence giving rise to the claim shall be determined by the *lex fori* (Art. 1 (6)); this, too, follows from the English rules on conflict of laws. "The act of invoking liability shall not constitute an admission of liability" (Art. 1 (7)), but note that where a ship has been released in accordance with section 5 (1), the successful applicant is deemed to have submitted to the jurisdiction of the court.

All that has been said about limitation of claims against ships applies *mutatis mutandis* to claims against harbour, dock and

conservancy authorities, who were given the right to limit claims against themselves by the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, including docks which are Crown property (s. 8 (5) of the 1958 Act, which amends s. 5 of the Crown Proceedings Act, 1947).

O. C. Giles.

The Act is of some interest from the point of view of the conflict of laws. The attention of specialists in this subject should be directed towards section 2 (4). It has hitherto been the law that the exclusion of liability under section 502 and the limitation of liability under section 503 of the 1894 Act applied within the limits set by the statute itself, *i.e.*, the former to all British ("seagoing") ships and the latter to all ships. Hence, in an English court, section 503 had to be applied, irrespective of all principles of the conflict of laws, as part of the *lex fori*, even though the relevant contract might be subject to foreign law or the *locus delicti* might be abroad. (See Dicey, *Conflict of Laws*, 7th ed., p. 757, note 36; p. 960, note 3.) On principle this remains true, but section 2 (4) of the Act creates an exception. Where the claim arises in respect of personal injuries (fatal or otherwise) or loss of or damage to property or infringement of rights of an employee of the person liable, it is governed by the proper law of the contract of service if this is more favourable to the employee. Thus the limitation set by the *lex fori* is only the lower limit of what, *e.g.*, an injured seaman will get by way of damages from the shipowner. If the proper law of his contract is more generous to him he can rely on it. This is a matter of principle in that for the first time personal injury claims between servant and master are characterised for conflicts purposes as contractual (whereas English domestic law classifies them as delictual), a characterisation in line with that prevailing in most foreign countries. No corresponding change, however, has been made in the application of section 502 of the 1894 Act, even as regards the effects of the crew, because section 502 was not within the Convention.

It is further to be observed that, on principle, the Act considers the date of the judgment as the relevant date in translating into sterling the gold francs amounts specified in section 1 (1). It is only where the person liable has made a payment into court that, by section 1 (4), a subsequent change in the gold francs value of the pound can be disregarded, and this only where sterling has appreciated, not where it has depreciated. The matter is not likely to be of very great practical importance, but is it not indicative of a policy quite different from that which has prompted the courts so strongly to insist on the "breach-date" rule when converting foreign money into sterling (see Dicey, *Conflict of Laws*, 7th ed., Rule 177)? It is true that, under the Act, the obligation is a

sterling obligation (provided the Minister has exercised his power under section 1 (3)) and the foreign currency is *in calculatione*, not *in obligatione*. But this does not affect the principle.

Lastly, specialists in the conflict of laws will not fail to notice the remarkable case of statutory implication of submission to the jurisdiction under section 5 (1), and the anticipatory effect of a foreign judgment *in futuro* under section 7 (1).

O. Kahn-Freund.

REPORTS OF COMMITTEES

The Report of the Tucker Committee on Proceedings before Examining Justices (July, 1958: Cmnd. 479)

In June 1957 the twelve members of this Departmental Committee were asked to consider "whether proceedings before examining justices should continue to take place in open court, and if so, whether it is necessary or desirable that any restriction should be placed on the publication of reports of such proceedings." The widespread publicity which had attended the preliminary examination in the case of Dr. John Bodkin Adams at Eastbourne had given rise to the suspicion that the jury might have been prejudiced by prior knowledge of the case, which would make their task in reaching a fair verdict more difficult. The verdict of acquittal to some extent allayed such fears, though a great many persons remained uneasy about the effect of such pre-trial publicity, and there was sufficient public concern to force the Government to set up this Committee, charged with a full investigation of the legal position. Now, just over twelve months later, we have their report and unanimous recommendations. After holding many meetings and receiving much evidence, the Committee, in twenty-five closely reasoned pages, dispose of this highly controversial question in what it will be submitted is a most satisfactory manner.

An account of the history of proceedings before examining justices shows that they were originally part of the inquisitorial process leading up to prosecution, and as such were not regarded as judicial proceedings at all in the sense that they had to take place in open court. The Indictable Offences Act, 1848 (known as Jervis' Act, after Sir John Jervis, the Attorney-General who introduced it) for the first time allowed the accused person the right to be present at the examination of the witnesses against him, but at the same time it expressly provided, by section 19, that the room or building in which a justice or justices took examinations in indictable offences should not be deemed an open court, and allowed the justices to exclude persons other than those directly concerned in the proceedings. Despite the consolidating character of these latter provisions, the Act seems to have marked a turning point in magisterial practice, for thereafter committal proceedings were normally taken in open court. In 1884 some doubts arose about the continuance in force of section 19 of the Act of 1848, in view of certain provisions of the Summary Jurisdiction Act, 1884, and these were never entirely resolved until the Magistrates' Courts Act, 1952, which, in section 4 (2), simply provided that examining justices were not obliged to sit in open court.

In the preliminary proceedings in the Adams case, the defence asked for certain parts of the evidence to be taken *in camera*, and the prosecution did not oppose this but pointed out that publicity was an important principle of trials. This has been interpreted by some as being an unwarranted opposition by the Crown to the defence's application, but this charge has been strenuously denied by the Attorney-General in the House of Commons. What cannot be denied is that the Crown counsel did not positively encourage the Eastbourne magistrates to grant the application, as Lord Birkett observed at the time in a television interview. And at the trial at the Old Bailey the judge, Devlin J., commented adversely on the introduction of this evidence in open court at the preliminary examination. The report observes that since this pronouncement there have been several cases where committal proceedings have been held *in camera* after an application by the defence relying on Mr. Justice Devlin's comments. But it is not sufficient to rely on the good sense of prosecutors and the defence and the wisdom of magistrates. More extensive use of a discretion which may be exercised in different ways by a thousand different benches is no solution to the problem, as the Report so rightly concludes.

The Committee are unanimous that legislation is required. Moreover they hold that there is no divine law which says that it is essential that preliminary proceedings shall be in public. In Scotland, where there is a completely different system, prior to the trial itself there is no publication of any evidence or allegations against the accused other than the formal charge. In Northern Ireland the position was the same as it is in England and Wales until 1953, when the law was altered to restrict the publication of reports of preliminary proceedings in some respects.

As the Committee see it, there are two aspects to this problem: (1) whether the proceedings should be *in camera*; (2) to what extent publication of reports of the proceedings shall be permitted. On the first question, they arrive quite easily at the conclusion that it is not necessary to recommend any further restriction on the open court principle in addition to those which exist already. Too many suspicions might be aroused from any extension of the practice of holding committal proceedings *in camera*. They do recommend, however, that the rather wide terms in which section 4 (2) of the Magistrates' Courts Act, 1952, states the position should be revised in the light of their main recommendations in favour of restricted reporting. It would then read to the effect that the power to hold proceedings *in camera* was limited to those cases or parts of cases where the justices consider that, notwithstanding the provisions concerning restricting reporting, the ends of justice would not be served unless they sit *in camera*. Examples are given of the type of case where this might apply.

On the second issue, that of reporting committal proceedings, more divergence was found among the witnesses (who had been

practically unanimous in upholding the open court principle). It is not by any means a necessary corollary of belief in the open court principle to believe that everything said in an open court can lawfully be published, and there are already considerable limitations on the publication of certain kinds of information. These mainly derive from statutes, which restrict the publication of any indecent matter, and in the case of any offence against decency or morality involving a child or young person, restrict the publication of the name and address or school of such person or any picture of him or her. Also in juvenile courts a similar prohibition applies (with certain qualifications). Moreover in 1926 the Judicial Proceedings (Regulation of Reports) Act prohibited the publication of full reports of divorce and analogous proceedings.

In the light of the evidence submitted to it, the Committee was forced to recognise that there was a large body of opinion which believed that the present system, allowing so much publicity to preliminary proceedings, was quite indefensible, and should only be continued if it were found to have some overriding merit. None such was discovered. Whether in fact juries are influenced by pre-trial publicity is a matter which is incapable of proof, the Committee believe. This is certainly true while we refuse to contemplate experiments such as have recently come to grief in Chicago, but surely something could be done to investigate the jury system without infringing on the secrecy of the jury room too dangerously. Or is the myth of the jury's unanimity and attention to the evidence to be carried forward for another generation?

The arguments for and against the present system are ably summarised by the Committee, who found their witnesses fairly evenly divided in their attitudes. "Some were satisfied that reports of committal proceedings could not affect the verdict of a British jury and emphasised that there was no positive evidence of prejudice; and these included both lawyers and almost all the journalists and press representatives who gave evidence before us. Others were in varying degrees convinced that in some cases there was a risk of prejudice and that the accused person and his friends believed that there was prejudice; and these too included lawyers of considerable practical experience." The danger of prejudice arises from three kinds of evidence which may be admitted at the preliminary stage:

(a) information (including previous convictions) given by the police or the prosecutor in order to assist the justices on the question of bail or remand in custody;

(b) evidence such as confessions and evidence of similar facts, which, though admitted at the preliminary stage, may be excluded by the judge at the trial;

(c) statements made by the prosecutor in his opening speech, which are not eventually borne out by the evidence of the witnesses, who do not live up to the expectations in this respect.

There is not much danger of the press publishing evidence in category (a), it seems, but evidence in categories (b) and (c) is frequently used, and in the Adams case was given wide publicity. It should also be borne in mind that the case as presented to the magistrates (and reported in the press) is often extremely one-sided, for the usual practice is for the defence to be reserved for the trial itself so that only the prosecution's version of the affair is heard at this stage. Little wonder that so many thoughtful citizens are seriously disturbed by the possibilities for prejudice. Nothing the trial judge can say later can hope to eliminate completely the effect of such evidence when it has been given the widest publicity.

The arguments in favour of the present system stem mainly from the fundamental principle that trials shall be held in open court and the belief that it is a necessary concomitant of this principle that the press shall have free access to preliminary proceedings and the right to report them in full. In addition to this thesis, there are the rather tenuous arguments that publicity kills rumour and prevents gossip by informing the public precisely about the nature and circumstances of the crime, and that occasionally such publicity results in witnesses coming forward who would otherwise not have been available. Taking these points in reverse order, the myth about additional evidence is carefully investigated by the Committee, who collected information about twenty-one cases where it was alleged that additional witnesses were forthcoming as a result of pre-trial publicity. (Was the case of Adolf Beck, as recorded in Mr. C. H. Rolph's book *Personal Identity*, at page 90, one of these?) A most comprehensive inquiry into the circumstances of each one of these cases led the Committee to the following conclusion: they could reach no firm opinion on "whether there would or might have been a conviction if the new witness had not come forward. Nor could we be certain whether it was the newspaper reports that prompted the witness to come forward and whether the evidence could not have been obtained by enquiries."

An even more cogent refutation of the validity of this argument about fresh evidence is contained in the next paragraph of the Report, which shrewdly observes the random nature of press reporting of preliminary proceedings. There might be something in this argument if *all* committal proceedings were reported, but in practice only a minority are selected for publication "on a basis that is not directly relevant to producing further witnesses," namely, news value.

The argument that publicity kills rumour and prevents gossip, and is useful in informing the public of the steps taken to bring offenders to justice, is considered by the Committee, but is not regarded by them as very cogent, and when set by the side of the admitted dangers of publicity, fades into insignificance.

With regard to the general principle of free reporting, the Committee draw a very valid distinction between reporting proceedings which have resulted in the discharge of the accused, which they think should be permitted, and reporting proceedings which result in a committal. They state that "it is right that where committal proceedings end in the discharge of the accused, the evidence on which the examining justices came to this decision should be fully reportable if all suspicion of favouritism is to be avoided." But where there is a committal for trial, there is no reason in principle why all the speeches and evidence should be immediately reportable.

Having reached this point, the Committee examine various methods whereby reports of committal proceedings might be limited. The Northern Ireland solution of 1953 does not commend itself entirely (it relies too much on the discretion of the justices) but one aspect of it is regarded favourably by the Committee—the prohibition of the publication of any opening statement by the prosecution. The Committee emphatically reject more sittings *in camera* or a general prohibition of reporting, and come out in favour of restricted reporting not unlike that already recognised since 1926 for divorce proceedings. This has the advantages that (a) no matter likely to prejudice the trial would be published, (b) no positive merit of the present system would be lost, and (c) it would be achieved without an embarrassing discretionary power. They are satisfied that "no lesser reform would be both adequate and practicable," and they are unanimous in this conclusion.

The particulars which shall be publishable if their solution is adopted are as follows:

(a) the identity of the court and the names of the examining justices;
(b) the name, address, occupation and age of the accused;
(c) the name, address and occupation of the prosecutor;
(d) the offence or offences (or a concise summary of them) with which the accused is charged;
(e) the name, address, occupation and age of the witnesses;
(f) the name of counsel and solicitors engaged;
(g) the decision to commit for trial, the charge or charges (or a concise summary of them) on which the accused is committed and the court to which he is committed;
(h) where the proceedings are adjourned, the date to which they are adjourned; and
(i) on committal or adjournment, whether or not the accused is admitted to bail, and if admitted to bail, the terms of his bail.

No report shall include anything more than these particulars, unless the accused has been discharged, or until the trial has ended.

These recommendations are to apply to reports by any medium, and not only to newspaper reports, and they are to apply in the case of persons jointly charged, where one or more of such persons is committed for trial. Post-trial publication of reports of preliminary proceedings will still be permissible, and the Committee think this may be desirable where, for example, the accused pleads guilty at the trial, and little information is given at that stage about the nature of the offence, or where there is some ground for expressing criticism of the preliminary proceedings. Whether these reasons for permitting unrestricted post-trial publication of reports of pre-trial proceedings are as sound as the Committee think is a matter for consideration. One can foresee extravagant use being made by some sections of the press of the right to publish " the full story " in all its dramatic details on the day or evening after the accused has been convicted. Whether this might be undesirable as being an additional penalty which the convicted person has to suffer is not considered in the Report, and it must be admitted that no considerations of prejudicing the trial are any longer present. It might be desirable to prescribe expressly the purposes for which post-trial publication shall be permissible. Among these, in addition to the two mentioned by the Committee as examples, one might add the bona fide publication of one of those volumes of *Famous Trials* which provide the criminal lawyer and the non-fiction crime-reading public with their bed-time stories.

Apart from these reservations about post-trial publicity, it is submitted that the Committee's recommendations are wholly satisfactory, and should be implemented without delay. A howl of protest has already gone up from Fleet Street, almost all the daily papers (including *The Times*) fiercely attacking the proposals. The Report records that " the evidence given by representatives of press organisations and by journalists was almost unanimous in its opposition to any change in the existing law." It is greatly to be hoped that this will not be regarded as sufficient reason for doing nothing to implement this courageous report which suggests such an eminently reasonable solution for a very serious problem.

J. E. Hall Williams.

NOTES OF CASES

Company Law—Oppression of Minorities

Scottish Co-operative Wholesale Society, Ltd. v. *Meyer*[1] has some claims to be regarded as the most important decision in the field of company law since the passing of the Companies Act, 1948. It concerns the new "alternative remedy" introduced by section 210 of that Act as a result of the recommendations of the Cohen Committee.[2] In effect the section enables the court to make any order it thinks appropriate to end a course of oppression in the conduct of the company's affairs. Hitherto there has been some reluctance in English professional circles to put this section to the ultimate test; it has been intensively invoked as a weapon in negotiation but there has been no example in England of a case under the section being fought to a successful conclusion. As so often our Scottish brethren have been bolder; their first major attack was unsuccessful,[3] but now they have triumphed. And the House of Lords have shown a determination to give the section a liberal interpretation.[4] Hence it is likely in future to play a still more important role in company practice.

Since the case has been debated in full on no less than three occasions[5] extending over four years, the facts and issues ought now to be reasonably familiar to practitioners. But owing to the insularity of English lawyers it is probable that many remained ignorant of this fascinating litigation until it left Edinburgh and came to Westminster—thereby converting it from a mere "foreign decision" to a binding authority. Briefly, then,[6] the two respondents were experts in the rayon business which the appellants (the Society) wished to enter upon. A company was accordingly formed

[1] [1958] 3 All E.R. 66, H.L., also reported in [1958] 3 W.L.R. 404.

[2] Cmd. 6659, paras. 60 and 152. Unlike certain of the alterations made by the 1948 Act this is one which has generally been followed by those Commonwealth countries which have recently amended their Acts.

[3] *Elder* v. *Elder & Watson*, 1952 S.C. 49.

[4] "Your Lordships are giving a liberal interpretation to section 210. But it is a new section designed to suppress an acknowledged mischief. When it comes before the House for the first time it is, I believe, in accordance with long precedent . . . that your Lordships should give such construction as shall advance the remedy. And that is what your Lordships do today." This characteristic remark of Lord Denning's ([1958] 3 All E.R., at p. 89) seems to represent the approach of all their Lordships. Even Lord Morton, who was the only one to express doubts about the result, expressly stated (at p. 75) that he was not disposed to give a narrow meaning to the words of the section having regard to its manifest object.

[5] Twice in the Inner House of the Court of Session (1954 S.C. 381 and 1957 S.C. 110) and finally in the House of Lords (*supra*).

[6] The facts are given in some detail in the speech of Lord Keith. As he says (at p. 75) "it is difficult to compress the salient features of the case even in broad outline," but the essentials are, it is thought, given in the text.

in 1946, the Society becoming the majority shareholder and the respondents the minority shareholders. The respondents and three of the directors of the Society (as its nominees) were directors of the company. The company needed three things: sources of supply of rayon yarn, a licence from Cotton Control and weaving mills. The respondents supplied the first two, together with the general "know-how," but the weaving mills used were those owned by the Society. For many years the business prospered and the company paid large dividends and accumulated substantial reserves. It was this, apparently, that led to trouble between the Society and the respondents. The Society had not subscribed for as large a proportion of the shares in the company as originally agreed. Accordingly it received a somewhat smaller proportion of the spoils than its directors thought appropriate. They therefore sought to realign the shareholdings on the basis that the respondents parted with some of theirs at par. Since the £1 shares were then worth something over £6 the respondents naturally objected to this and the Society was ultimately advised that it could not insist. This rebuff was met by threats, conveyed to the respondents through the Society's nominee directors, that the Society would put the company into liquidation. This it could not do straight-forwardly, as it did not hold a three-quarters majority of the shares.

In June, 1952, cotton control was abolished and this meant that the Society could henceforth obtain rayon yarn and weave cloth without a licence. It accordingly started to do so for itself and starved the company of supplies by refusing to manufacture for it except at uneconomic prices. As all other mills were fully occupied the company was being starved to death. This, it later became clear, was the Society's intention and one well known to its nominee directors on the company's board. The latter, however, did nothing to attempt to prevent its demise. In July, 1953, when the company was obviously almost at death's door, the respondents instituted proceedings under section 210. They claimed, in the words of that section, that "the affairs of the company were being conducted in a manner oppressive to some part of the members," that "to wind up the company would unfairly prejudice that part of the members but otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable." And they asked that "with a view to bringing to an end the matters complained of" the court should order the Society to purchase the respondents' shares at a fair price.

The petition came first before the Inner House on relevancy, *i.e.*, on the question whether the facts pleaded disclosed a cause of action. The court ruled that they did.[7] Evidence was then taken before one of the judges and the matter again came before the full division, which gave judgment for the respondents and ordered

[7] 1954 S.C. 381.

the Society to purchase their shares at £3 15s. each.[8] The House of Lords dismissed the Society's appeal. All three decisions were unanimous.

Whatever "oppression" may mean, and a variety of definitions were canvassed, it could hardly be doubted that the respondents had been oppressed. But this alone was not sufficient to afford them a remedy under the section. They had to show that the "affairs of the company had been conducted" oppressively. The Society argued that it was not conducting the company's affairs, its directors were. All the Society had done was to promote its own economic interests by driving a competitor to the wall. Had the company been wholly independent of the Society it could hardly be doubted that the latter would have been within its rights.[9] Did the fact that the company was a subsidiary of the Society suffice to make the latter liable? Or was it necessary to go further and to show that the nominee directors had themselves conducted the company's business oppressively in the interests of the Society?

On these questions their Lordships were not, it seems, wholly in agreement. In the House of Lords, Lords Simonds[10] and Keith[11] adopted the view of Lord Cooper[12] that: "In my view the section warrants the court in looking at the business realities of a situation and does not confine them to a narrow legalistic view. The truth is that, whenever a subsidiary is formed as in this case with an independent minority of shareholders the parent company must, if it is engaged in the same class of business, accept as a result of having formed such a subsidiary an obligation so to conduct what are in a sense its own affairs as to deal fairly with its subsidiary." Indeed, Lord Simonds went so far as to declare that it was impossible to separate the transactions of the Society from those of the company; "every step taken by the latter was determined by the policy of the former."[13]

Lord Denning, on the other hand, emphasised the impact of the Society's conduct on the nominee directors; "by subordinating the interests of the company to those of the Society, they conducted the affairs of the company in a manner oppressive to the other shareholders."[14] The fact that they were perhaps guilty merely of inaction was irrelevant; "the affairs of a company can . . . be conducted oppressively by the directors doing nothing to defend its interests when they ought to do something." They ought at least to have protested; it did not lie in their mouths to say that a protest would have done no good. On the other

[8] 1957 S.C. 110. A serious trade recession in 1951–52 had reduced the value of the shares which, as already pointed out, had at one time been worth over £6.
[9] *Per* Lord Keith, at p. 84.
[10] At p. 72.
[11] At p. 85.
[12] At 1954 S.C. 391.
[13] At p. 71.
[14] At p. 88.

hand Lord Denning would not apparently have denied that an action might have been successful even without misconduct on the part of the nominee directors. He said that what was relevant was the conduct of those in control of a company's affairs. And that might be "some of the directors themselves, *or, behind them, a group of shareholders* who nominate these directors or whose interests the directors serve." [15]

Only Lord Morton came out categorically against this view. According to him, though he thought it unfortunate, the respondents could not succeed "merely by proving that the affairs of another company are being [conducted in a manner oppressive to them] even if that other company holds the majority of the shares in the company whereof the respondents are members and nominates the majority of its directors." [16] Nor was he clear that mere culpable inaction by the nominee directors at a time when the day-to-day affairs of the company were conducted by the respondents, would come within the section. He concurred in the result on the ground that there was evidence to justify the view that the company's affairs had been conducted oppressively, but he carefully avoided saying what evidence he had in mind.

What is certainly clear (clearer than it has ever been) is that a holding company is in a highly vulnerable position if there are independent shareholders in the subsidiary. It is to be hoped that the realisation of this will discourage the disquieting growth [17] of take-over bids in which the bidding company is content with something less than the 90 per cent. response which will enable it to convert the company into the wholly owned subsidiary.[18] Lord Cooper's dictum, though expressed to apply where a company has been *formed* as a subsidiary must presumably be equally applicable to a case where it later becomes a subsidiary.[19]

Another valuable point emerges from the speeches in the House of Lords. The fact that the company cannot be preserved as a going concern is no ground for refusing the so-called alternative remedy under section 210. This, too, had been the view of the Court of Session,[20] but a contrary decision [21] had been reached in South Africa under the equivalent section in their Act. Both Lord Keith [22] and Lord Denning [23] expressly advert to this point and happily decide that the section is not restricted in this way.

[15] At p. 87. (Italics supplied.)
[16] At p. 74.
[17] See the excellent article in (1958) 69 *Accountancy* 116.
[18] Under s. 209.
[19] An argument to the contrary might, however, be based on Lord Keith's line of reasoning. He took the view that the agreement between the respondents and the Society was in substance a partnership imposing duties of good faith on both parties: see pp. 84–86.
[20] 1954 S.C., at 392 and 393.
[21] *Irvin & Johnson* v. *Oelofse Fisheries, Ltd.* 1954 (1) S.A. 231.
[22] At p. 86.
[23] At p. 89. Lord Simonds seems to have been of the same opinion: see p. 72.

Although, as the Society argued, an order forcing them to buy shares for £3 15s.[24] at a time when they were probably worthless was in a sense equivalent to an award of damages for past misconduct, it was equally a method of bringing to an end the oppression complained of. Whether the company then survived or not was a matter for the oppressor. The object of the section was to end oppression, not to save the company.

Finally, attention should be drawn to the remarks of Lord Denning [25] on the implications of the decision on multiple directorships. Hitherto it has been assumed, on the basis of an inadequately reported decision [26] and a dictum of Lord Blanesburgh [27] that a director is at liberty to become also a director of a rival concern. That seems still to be so, anomalous though it may be.[28] But he is "at the risk now of an application under section 210 if he subordinates the interests of the one company to those of the other." [29] The fact that the directors were placed on the board as nominees of the parent Society was no excuse. They were wrong in thinking that as "nominees" of the Society their first duty was to the Society. Their position was described by Lord Simonds as "difficult and delicate" [30]; Lord Denning dubbed it "impossible." [31] "Impossible" it may be, but it is certainly not uncommon. Perhaps it may now become less frequent.

L. C. B. G.

Rayfield *v.* Hands—A Postscript and a Drop of Scotch

My note (at p. 401, *supra*) has provoked counsel for the plaintiff to place me in his debt by indicating the lines of his successful argument in the above case.[1] The closely reasoned argument throws new light on the judgment and it would seem desirable to draw it to our readers' attention.[2]

The most difficult part of the plaintiff's case was, of course, to persuade the learned judge that an article of association which provided that *directors* should purchase a member's shares imposed obligations on the directors, not *qua* directors, but *qua* members.

24 A price representing "the value which the shares would have had at the date of the petition if there had been no oppression": *per* Lord Denning at p. 88. See also p. 72 (Lord Simonds) and p. 86 (Lord Keith).
25 At pp. 87–88.
26 *London & Mashonaland Exploration Co.* v. *New Mashonaland Exploration Co.* [1891] W.N. 163.
27 In *Bell* v. *Lever Bros.* [1932] A.C. at p. 195.
28 See Gower, *Modern Company Law* (2nd ed.) pp. 496–497.
29 At p. 88.
30 At p. 71.
31 At p. 88.
1 [1958] 2 W.L.R. 851; [1958] 2 All E.R. 194.
2 It is understood that the argument will be summarised in the report to appear in due course in *The Law Reports*.

Counsel argued that *qua* directors it was immaterial to them who owned the shares, but *qua* members they were precisely the particular members whom one would expect to be buyers of shares in a private company, for they alone had access to the books, could assess prospects and determine policy. The article was, therefore, selecting a particular category of members as purchasers, *viz.*, those members who were directors, just as it might have designated male members or those who held ordinary shares. The dubious case of *Re Leicester Club & Racecourse Co.* was cited merely to illustrate the proposition that a reference to directors need not *necessarily* refer to them in that capacity, and counsel was not concerned to argue whether the actual decision in that case was right or wrong.

This argument would not, of course, have applied to a case such as *Eley* v. *Positive Government Life Assurance* [3]; there the article affected a member in his capacity of a solicitor, not a solicitor in his capacity of member. Nor could it be adopted in the case of a company where directors did not have to be members. Even in the instant case where the directors were required to hold a share qualification it did not necessarily follow that every director would be a member at the appropriate time, for he would have two months after appointment in which to acquire his qualifying shares.[4] But counsel could argue that by accepting office he had assumed an obligation to become a member and "equity looks upon as done that which ought to be done." Nor would the argument be as strong in the case of a public company, for there more information is available to all and directors are not the obvious buyers; it was doubtless this consideration which prompted the learned judge's caveat [5] that his decision would not necessarily have applied to a public company.

Counsel's argument on this point would, of course, have been stronger had the article provided that directors should acquire the shares in proportion to their existing holdings. The fact that they were to acquire them equally weakens the argument that directors were selected *qua* members rather than *qua* directors.

Counsel's second problem was to persuade the judge that, notwithstanding the dictum of Lord Herschell in *Welton* v. *Saffery*,[6] (which Vaisey J. found "cryptic"), an article could constitute a contract directly enforceable by one member against another. It was for this purpose that he relied on section 56 of the Law of Property Act, 1925, and Denning L.J.'s dicta thereon, arguing that even if Lord Herschell had been right at the time, his opinion

[3] (1876) 1 Ex.D. 88, C.A.

[4] Companies Act, 1948, s. 182.

[5] [1948] 2 W.L.R. at 857. While ignorant of the exact lines of counsel's argument I found this observation "cryptic" (see *supra*, p. 403), but light has now dawned.

[6] [1897] A.C. 299, H.L., at p. 312: "[T]here is no contract in terms between the individual members of the company, but the articles do not any the less, in my opinion, regulate their rights *inter se. Such rights can only be enforced by or against a member through the company . . .*"

had been outmoded by statute. He also argued that the article in question might found a contract quite independently of section 20 of the Companies Act. It was here that he cited *Carlill* v. *Carbolic Smokeball* [7] and *Clarke* v. *Dunraven*.[8] When directors assume office they do so on the terms of the articles: see, *e.g.*, *Swabey* v. *Port Darwin Gold Mining Co.*[9] When the articles contain a provision such as the one in question the directors, it was argued, make a continuing offer to the other members for the time being to purchase any shares tendered for sale by those members. This offer can be turned into a binding contract by acceptance. The position, so it was contended, was analogous to the advertisement in *Carlill's* case or the racing rules in *Clarke* v. *Dunraven*. As Lord Herschell himself had said in the latter case [10]: "The effect of their entering the race and undertaking to be bound by [the] rules to the knowledge of each other is sufficient, I think, where those rules indicate a liability on the part of the one to the other, to create a contractual obligation to discharge that liability." So, here, the member-directors had undertaken to purchase in accordance with the articles by which all members were bound on joining the company.

It is interesting to compare this case with one facet of the *Lyle & Scott* [11] litigation which has recently enlivened legal practice north of the border. Lyle & Scott Ltd. has been the subject of a take-over bid by House of Fraser, Ltd. The latter's offer has been accepted by a majority of the shareholders but has been vehemently opposed by the directors and their allies. The articles contain a provision that no holder of more than 1 per cent. of the shares shall, without the consent of the directors, transfer his shares so long as any other shareholder is willing to purchase them and they specify the procedure to be followed by any shareholder "desirous of transferring his ordinary shares." [12] Had this procedure been followed it would, of course, have foiled Fraser. Accordingly it was agreed that no transfers should be lodged for the time being and the purchase price was paid against delivery of share certificates and proxies in the purchaser's favour. If Fraser gains control of the board of directors transfers will no doubt be completed and registered.

The board of directors countered these moves by instituting proceedings in the name of the company against the selling shareholders claiming a declaration that they were bound to follow the procedure laid down in the articles, a decree ordering them to do

[7] [1893] 1 Q.B. 256, C.A.
[8] [1897] A.C. 59, H.L.
[9] (1889) 1 Meg. 385, C.A.
[10] [1897] A.C. 59 at 63.
[11] *Lyle & Scott, Ltd.* v. *Scott's Trustees*, 1958 S.L.T. 169.
[12] The procedure is the customary one of sale notice to the company secretary and circulation by him to the other shareholders who can then make an offer for some or all of the shares concerned.

so, and interdicts (*anglice* injunctions) restraining them from voting at the forthcoming general meeting. Interim interdicts were granted and Fraser was thus prevented from gaining control at that meeting. The action then proceeded on the application to compel compliance with the articles. Lord Strachan held that the shareholders were in breach of the articles but that they could not be ordered to follow out the prescribed pre-emption procedure, and this decision has been affirmed on appeal. The court held that, on their true interpretation, the articles forbade not merely a formal transfer but any agreement to sell the shares. Here the averments showed that there had been a sale of the shares and not merely an agreement to dispose of the beneficial ownership leaving the legal ownership where it had been.[13] As the Lord President pointed out, any other conclusion would afford a simple way by which a shareholder could evade the safeguards afforded other shareholders by pre-emptive rights and would mean that " articles of this kind which have hitherto been regarded as valuable protection to the continuity of private companies are not worth the paper on which they are written." [14]

Unfortunately, by then deciding that the company could not compel the shareholders concerned to sell the shares to the other members the court seems to have come close to rendering the articles valueless. The court felt constrained to hold that the shareholders were entitled to say that they were not then " desirous of transferring " their shares and that accordingly they could not be compelled to set in motion the prescribed sale procedure. The court said that this was not the " appropriate remedy," but it is difficult to see what other effective remedy is available. Perhaps either the shareholders or Fraser could rescind the transaction, but neither wishes to do so. It is the *company* (or, more realistically, the present board and their supporters) that need a remedy. The only one, seemingly, is to apply for an interdict before each succeeding general meeting restraining the shareholders concerned from voting. Perhaps we shall discover later whether the court will be prepared to freeze the shares in this way for an indefinite period; it hardly seems an ideal solution from the viewpoint of either faction.

The *Lyle & Scott* case was free from the legal complications which arose in *Rayfield* v. *Hands*. There was no doubt that the article concerned affected only members *qua* members, and proceedings were brought by the company itself. It shows, nevertheless, that even without these complications articles of this sort may not be as effective as had been assumed. Though the shareholder who wishes to sell may be able to enforce the articles

[13] It is doubtful how far this would be recognised under Scots law: and whether this too would have been precluded by the articles, see 1958 S.L.T. at p. 178 (Clyde L.P.).

[14] At p. 177.

vis-à-vis the company and the other shareholders, it seems that the latter may not be able to compel a sale by a shareholder who has parted with his beneficial interest in the shares. From a practical point of view this is all-important. Perhaps the point could be met by careful drafting of the article in question, but most articles now in use will need revision in the light of the *Lyle & Scott* case.

L. C. B. G.

Disqualifications Imposed by Trade Associations—Jurisdiction of Court and Natural Justice

"Much as I deplore the methods of the defendants, greatly as I doubt whether it is in the interests of the trade which they purport to represent to behave in this kind of way, I cannot hold that the plaintiff has any legal ground for the accusations he makes against them. His action must therefore fail, and must be dismissed with the usual consequences." With these somewhat depressing words, Harman J. concluded his judgment in *Byrne* v. *Kinematograph Renters Society, Ltd.*,[1] and thereby demonstrated once again the seeming inability of the common law (in this country at least) to afford any effective remedy to those subjected to the oppression of self-appointed monopoly groups.

The case itself involved a variation from the more familiar situation where it is alleged that a member has been wrongfully expelled from his association. Basically, however, the facts resembled those in the earlier cases of *Russell* v. *Duke of Norfolk*[2] and *Davis* v. *Carew-Pole*,[3] and like those cases raised in an acute form both the grounds upon which the court may have jurisdiction to intervene and the circumstances in which the jurisdiction, if established, will be exercised.

The plaintiffs controlled two cinemas. The first defendant, K.R.S., Ltd., is a company whose object is to protect the interests of film renters (that is, distributors of films to exhibitors) in this country. The second defendant, C.E.A., is a trade union concerned to protect the interests of exhibitors of films and their employees. Two other defendants were employees of K.R.S. It is the practice in the trade for exhibitors to make returns to the distributors of the number of tickets sold and the box office takings. As a result of a complaint from a member of K.R.S. it was decided to investigate the situation at the plaintiff's cinemas. K.R.S. inspectors accordingly were sent to investigate on a number of occasions and discovered discrepancies in the returns for which the plaintiff could give no satisfactory explanation, though he attributed them to lack of adequate staff. A report was made to the joint investigation

[1] [1958] 1 W.L.R. 762 at p. 786; [1958] 2 All E.R. 579 at p. 600.
[2] [1948] 1 All E.R. 488.
[3] [1956] 1 W.L.R. 833.

committee of K.R.S. and C.E.A. and the plaintiff was later told that he could attend a meeting of the committee and, if he wished, make representations on the matter. At the meeting the plaintiff was told of the report but not allowed to see it. He read certain letters to the committee and was also questioned. He then asked to be allowed to call his wife, who helped him in the business, but this was refused. Following this meeting K.R.S. recommended its members not to supply films to the plaintiff, who was told that this course was adopted pending a full investigation by accountants nominated by K.R.S., and to be conducted at the plaintiff's expense in any event. The plaintiff said he was only willing to agree to an investigation by an independent accountant. As a result the recommendation came into operation and the plaintiff was thus unable to continue his business, since the members of K.R.S. accept such a recommendation as a matter of course. The plaintiff accordingly brought his action alleging conspiracy [4] and also for a declaration, an injunction, and damages on the ground that the proceedings before the committee were contrary to natural justice.

Harman J. held as follows:

(i) That the claim for conspiracy failed because there were no unlawful means used [5] and the predominant purpose of the defendants was not to injure the plaintiff but to protect their trade interests.

(ii) That in the absence of any contractual relationship no relief could be afforded to the plaintiff either by way of damages or limited to a declaration and/or an injunction.

(iii) That when the plaintiff was invited to attend the inquiry, it was right to imply a contract between the plaintiff and K.R.S., that the inquiry would be fairly conducted, which in effect meant that the principles of natural justice should be observed.

(iv) That nevertheless on the facts there was no failure to observe natural justice.

The learned judge observed that there was no allegation of dishonesty or fraud against the plaintiff and that the result of the decision of K.R.S. had brought about a punishment altogether disproportionate to the offence. Nonetheless the law was powerless to grant any relief to the plaintiff for the loss of his livelihood.

It is proposed to confine this note to a reference to the basis of the court's jurisdiction and to the question of natural justice.

[4] Conspiracy was alleged against all four defendants, though damages could not be claimed against the second defendant, being a trade union.

[5] Acts of trespass and unlawful invasion of privacy were relied on. Trespass was negatived, and as to the latter Harman J. contented himself with the words: "I can only say that I do not appreciate this argument" (p. 777).

Jurisdiction.—On this, Harman J. declined to accept the view of Pilcher J. in *Davis* v. *Carew-Pole*, that though a contractual nexus was essential to found a claim for damages the remedies of declaration or injunction could be granted without the existence of a contract and its breach being established. Pilcher J. in that case had based himself on *Abbott* v. *Sullivan* [6] which is admittedly a most unsatisfactory case to found any argument upon, for reasons which I have already fully discussed in an earlier issue of this *Review* and need not be gone into again here.[7] Suffice it to say that Harman J. was of opinion that the Court of Appeal in that case accepted that there was a sufficient contractual nexus to justify the declaration granted by the trial judge, but that its terms were insufficiently made out to warrant a claim for damages. With all respect this seems to savour a little of the fallacy exposed by the House of Lords in *Bonsor* v. *Musicians' Union* [8] of drawing a distinction between a breach of contract justifying relief by way of a declaration or injunction and a breach capable of being remedied by damages. It may be that on the true construction of the judgments of the majority judges in *Abbott* v. *Sullivan* this did in fact represent the view of the Court of Appeal in 1952, but if so it seems difficult to reconcile with the decision of the House of Lords given in *Bonsor* in 1956. Moreover, Harman J. relied particularly on the view of Evershed M.R. and Denning L.J. that the jurisdiction of the expelling committee must be founded upon a contract express or implied. But, as I have pointed out already elsewhere,[9] the emphasis here is not on the jurisdiction of the *court* but of the *committee* effecting the expulsion. Indeed the Master of the Rolls stated that "in the circumstances the judge arrived at the conclusion, as I think, rightly, that the necessary contractual foundation for what had been done had not been established." [10] This appears to mean that the committee in *Abbott* v. *Sullivan* had no contractual powers to expel the plaintiff, and is therefore consistent either with a total absence of contract or with the existence of a contract but not containing any power of expulsion. If it is said that the latter is the true purport of the judgments in *Abbott* v. *Sullivan* it leads to the odd result that the court has thereby held that in the total absence of contract the committee has no power to expel or disqualify, yet on the other hand the court is equally powerless to record that finding in a declaration. Why this should be so is very hard to perceive, or, if it may be said with respect, to justify on any rational ground.

Denning L.J. indeed in *Lee* v. *Showmen's Guild* [11] did go so far as to say that the basis of the jurisdiction was that no tribunal

[6] [1952] 1 K.B. 189.
[7] (1952) 15 M.L.R., pp. 413 *et seq.*
[8] [1956] A.C. 104.
[9] See "The Right to Work" in (1957) *Current Legal Problems* 36 at p. 43.
[10] [1952] 1 K.B., at p. 194.
[11] [1952] 2 Q.B. 329 at p. 347.

could sit in judgment on others without the sanction of Parliament or an agreement of the parties, and this seems the logical conclusion to be derived from basing the jurisdiction of the *tribunal* on contract express or implied. But it becomes *brutum fulmen* if the court, when no such contract is established, then washes its hands of the matter on the footing that, failing a contract, the court itself is precluded from acting in the matter. It may perhaps be doubted whether the court would carry this principle to the length of requiring a contract in all cases. For instance, the powers of the Jockey Club or of the Boxing Board of Control would almost certainly be regarded as validly exercisable against a person who declined to attend an inquiry to which he was summoned, even though no contractual relation could be spelt out, apart from any agreement to attend the inquiry (which *ex hypothesi* would not exist in such a case). Unless then the court in such a case is prepared to hold and so declare that no valid decisions could be given by the Stewards in the absence of an agreement conferring jurisdiction, the court will in effect, by its negative attitude in refusing to intervene, thereby be tacitly acknowledging that the Stewards have lawfully and validly exercised their powers. For an action which a court of law refuses to restrain is thereby acknowledged to be lawful or at least not unlawful, and it does seem anomalous, to say the least, that while a court may be of opinion that a penal decision has been imposed without a contractual basis it is not only precluded from saying so, but is even bound negatively to endorse the decision by a refusal to intervene.

Would not the better view at the present day, in the light of the far-reaching economic consequences of this type of procedure, be for the court to say that even in the absence of contract it recognises that penal sanctions may be imposed *de facto* by trade and other associations on non-members, but that public policy imposes the requirement that no such powers shall be exercised without at least regard to the principles of natural justice? In support of this it may be pointed out that it has been reiterated on several occasions by Denning L.J. that public policy prevents the exclusion of the rules of natural justice where these ought to be observed,[12] and it seems but restating the matter to say that the rules of natural justice are not simply to be regarded as implied terms in a contract (for if they need to be implied why can they not be excluded expressly?) but are imposed *ab extra* by the law itself in the name of public policy. And if public policy requires observance of these principles it would be strange indeed if a court was precluded from declaring that they had been infringed.

As for the question whether the remedies of declaration or injunction would lie in the absence of a breach of contract,

[12] *Russell* v. *Duke of Norfolk* [1949] 1 All E.R. 109 at p. 119; *Abbott* v. *Sullivan* [1952] 1 K.B. at p. 198; *Bonsor* v. *Musicians' Union* [1954] 1 Ch. 479 at p. 485.

Harman J., after expressing his view of the effect of *Abbott* v. *Sullivan*, contented himself with the brief statement that in his judgment these remedies must have a legal and a contractual basis no less than the remedy of damages. Apart from the feeling that this is a general proposition which deserved wider examination than consideration of a few obscure passages in *Abbott* v. *Sullivan* can afford,[13] may not this be a case for the application of the old, but by no means obsolete, maxim, *ubi jus ibi remedium*? If the courts have gradually been led to the view that in the existing state of economic affairs public policy (which means for this purpose, in effect, the common law) requires natural justice to be observed in certain types of disciplinary proceedings, does this not confer a right on those who are sought to be disciplined to the observance of those principles, and if so should the court not grant the aggrieved citizen a remedy? Damages, it may be, he cannot get, in the absence of contract, in view of the refusal of the courts in this country [14] to treat cases of this type as giving rise to tortious liability (apart from conspiracy or express malice). But are equitable remedies really so slavishly tied to damages that they cannot ever be granted save where there exists the legal possibility of awarding damages? It would be surprising and I submit most unfortunate if this was so, and, in the absence of conclusive and authoritative pronouncements to this effect, there seems no reason why the courts should desire to tie their hands in this artificial way. It is interesting in this connection to recall that the majority of the Court of Appeal in *Bonsor* felt no inhibitions on this ground in saying that the remedies by way of declaration and injunction were available to an expelled union member even though damages were legally irrecoverable,[15] and though this decision was subsequently reversed, there was no suggestion in the House of Lords that, quite apart from contract, such a position would be a legal impossibility.

Despite the foregoing criticisms, it may be thought satisfactory that Harman J. felt himself able to agree with the contention previously acceded to by Pilcher J. in *Davis* v. *Carew-Pole*, that an implied contract might be spelt out of the agreement to attend the inquiry, and that it was a term of such a contract that the inquiry should be fairly conducted. After referring to the speech of Lord Parmoor in *Weinberger* v. *Inglis* [16] the learned judge continued: "It seems to me that bodies like K.R.S., who exercise monopolistic powers and may ruin a man by their recommendations, ought not to act in an arbitrary manner or at the least that if they do, as this body did, set up an investigation committee which is a quasi-judicial body, they must be taken to hold out to those

[13] *Cf.* "The Right to Work," *supra*, at p. 47 (and authorities there cited).
[14] But as to Canada see *Orchard* v. *Tunney* [1957] S.C.R. 436; and a comment thereon by the present writer in (1958) 36 Can.B.R. 83.
[15] See especially *per* Jenkins L.J. [1954] Ch. at p. 523.
[16] [1919] A.C. 603 at p. 606.

over whom they claim to exercise jurisdiction the assurance that the proceedings will be fair." [17]

Natural justice.—The learned judge equated a fair hearing with the principles of natural justice but went on to refer to the reservations of Tucker L.J. in *Russell's* case in a passage also relied upon by Pilcher J. In this passage Tucker L.J. made the rather disturbing suggestion that the principles of natural justice are variable and must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with and so forth.[18] While apparently accepting this qualification, Harman J. however took the view that in a case such as that before him those principles contained the requirements as usually enunciated, *viz.*, that the accused should know the nature of the accusation made, that he should be given an opportunity to state his case, and that the tribunal should act in good faith. The allegation of a want of good faith was based on various matters all of which were rejected. As regards the two other complaints of moment, *viz.*, the refusal to show the report itself to the plaintiff and the refusal to allow him to call his wife as a witness, the learned judge held in neither instance was natural justice infringed. As to the first the judge said: "This is much more serious but on the whole I conclude that the plaintiff was not injured in this respect. There is nothing in it [the report] which is not in Belton's letter to the plaintiff of May 11, and the plaintiff knew what was the complaint made against him." [19] From this it is not quite clear whether the learned judge regarded this matter as going to the question of the notice of the charge only, or also to the question whether he was given a proper opportunity to defend himself. It is submitted that such a matter goes to both issues and that even if the plaintiff had had sufficient notice of the charge he should not have been tried on the basis of undisclosed documents. Unfortunately however the courts seem to take a rigidly narrow view of natural justice in these cases and are very disposed to hold that because, admittedly, the tribunal is not tied to the procedure of a court, it may act in a manner which is manifestly unfair and still have its decisions upheld. For what could be more unfair than refusing to show a man the evidence on which he is to be convicted? It is difficult to understand why the court does not insist in such a case that a failure to disclose the evidence before the tribunal almost automatically prevents a man having a proper opportunity to defend himself, even though the document or other evidence if disclosed would have added little or nothing to the plaintiff's general grasp of the case made against him. But it must be admitted with regret

[17] [1958] 1 W.L.R. at pp. 783–784.
[18] [1949] 1 All E.R. 109 at p. 118. For a criticism, see "The Right to Work," *supra*, at p. 49.
[19] [1958] 1 W.L.R. at p. 785.

that both in *Russell's* case and again in *Davis* v. *Carew-Pole* the court showed the same unwillingness to give any real material content to the conception of natural justice.

Similar comments may be made regarding the refusal to permit the plaintiff's wife to be called, which in the circumstances Harman J. also held not to infringe natural justice. The learned judge took the view that, having heard her evidence, she was not able to add anything on the only relevant point, *viz.*, an explanation of the discrepancies. If therefore she had been heard she could not have altered the result.[20] Here again there is something anomalous which militates against the complainant. On the one hand the court never tires of asserting that it cannot retry the case decided by the tribunal or rehear the evidence of the facts, so that the complainant cannot get the case reopened by way of appeal in a court of law. Yet if he complains that he had a witness whom the tribunal quite arbitrarily refused to hear, the court is apparently then prepared to go into the question of that witness's evidence and its bearing on the issue and decide whether or not it would be likely to have influenced the decision. But it may be urged that if the court is not concerned with the merits of the case but only whether natural justice (in a procedural sense) has been followed, it should equally decline in the interests of the defendant to form its own view as to the relevance or weight of the potential witness's evidence and whether it was capable of influencing the tribunal. For if this is to be taken into account, then where no notice at all has been given to the accused, a court may equally decline to interfere on the ground that it is of opinion that in any event the accused had no effective answer to the charge. And what is this but retrying the merits of the case? [21]

With each new reported case bearing on the powers of trade and other associations to inflict economic ruin on those under their control, one gets a further glimpse into the vast ramifications of these self-contained and autonomous "legal systems," their immense scope and authority, and at the same time one sees the manifest hesitation with which our courts approach the question of their control by legal process. That some progress has nevertheless been made I would willingly admit, but in this country at least the courts still seem to display a lack of self-confidence in tackling these new situations created by a changed economic order, and to be more ready to create fetters to tie their own hands than flexible principles capable of being applied and adapted to novel conditions. It is still perhaps not too late for our much vaunted common law system to prove its inherent capacity to

[20] *Ibid.*, p. 785.

[21] Yet Pilcher J. held in *Davis* v. *Carew-Pole* that failure to give notice of certain charges was immaterial, on the ground that the accused had no effective defence to these. *Sed quaere*, is it not against natural justice to try even a guilty man without notice and without giving him an opportunity to be heard?

confront fresh tasks in a constructive spirit and indeed the courts in some other common law jurisdictions have already pointed the way. But the scope for future development appears very limited so long as the jurisdiction remains tied to a thoroughly artificial nexus of contract, and so long as the courts decline to impose a more exacting standard of natural justice.

Dennis Lloyd.

Interest Under the Evidence Act, 1938

The question of what constitutes an interest under the Evidence Act, 1938, was again before the court in *Kelleher* v. *T. Wall & Sons, Ltd.*[1] In that case the plaintiff was employed by the defendants as a charge-hand in the production department at one of their factories. When lifting a machine onto a trolley the plaintiff suffered an injury to his right hand, and he brought this action alleging negligence and breach of statutory duty, which were denied. At the hearing the defendants tendered in evidence a written statement made by a supervisor in the production department, who was present when the plaintiff received instructions to move the machine. The statement had been made to the defendants' insurers about three months after the incident, and the supervisor had died before the trial. For the plaintiff it was objected that the statement was inadmissible by virtue of section 1 (3) of the Act of 1938. That provision enacts:

> "Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish."

It was not denied that proceedings were at least contemplated when the statement was made, while the other requirements of section 1 of the Act had been complied with. Thus the sole question for consideration on the point of evidence was whether the deceased maker of the statement was a person interested at the relevant time. Barry J. accepted the contention for the plaintiff that the maker was so interested, on the ground that any criticism of the conduct of the department would necessarily reflect upon the supervisor. He accordingly ruled that the statement was inadmissible and excluded it.

The Evidence Act, 1938, throws no light on what is meant by "interested." The Act emanated from a committee of judges.[2] A shrewd lack of precision in judicial pronouncements is not unknown, for example in the Judges' Rules on confessional statements. Even though some of the Rules of 1912 and 1918 were

[1] [1958] 3 W.L.R. 236; [1958] 2 All E.R. 686.

[2] See *Report of the Royal Commission on the Dispatch of Business at Common Law, 1934–36* (1936: Cmd. 5065) 79; Maugham, "Observations on the Law of Evidence . . ." (1939) 17 *Canadian Bar Review* 469, at pp. 479, 480.

clarified in 1930,[3] others still retain sufficient elasticity to allow everyone concerned the exercise of a discretion; and, being only administrative in character, the Rules probably accomplish their object. But there is little justification for similar uncertainty in an enactment: indeed, the drafting of the Evidence Act, 1938, has been the subject of considerable adverse comment.[4] (Parenthetically, it may be observed that criticism is not usually directed to section 2.[5] Yet section 2 (1) seems to be superfluous, for it instructs the professional judges of the civil courts on the cogency of admissible documentary evidence,[6] and it contemplates the reception in evidence of statements by persons who had an incentive to conceal or misrepresent facts but were not interested within section 1 (3).[7]) The distinguished lawyers who framed section 1 (3) were doubtless aware that, in evidence at common law, there were four types of interest—that which rendered prospective witnesses incompetent to give testimony, that which affects the admissibility of three classes of declaration by deceased persons, that which makes admissible some other declarations by such persons, that which permits the reception in evidence of informal admissions—and that none of these types of interest is necessarily identical. Yet the draftsmen provided no guidance as to what they meant by an interested person, and left the courts to struggle with the subject.

The result was that in twenty years this one subsection of the Act had already engendered at least sixteen reported cases [8] before the decision in *Kelleher's* case. Of these sixteen, six only were cited to the court and three only were mentioned in the judgment. The learned judge adapted a statement of Morton J. (as he then was), in an early case on the Act,[9] holding that a person interested means a person who cannot in a true sense be regarded as an independent person; but though this view has been followed at first instance, there are at least three decisions of equal authority in which persons who were not independent in the usual sense were held not to be interested.[10] The judgment also disapproved of a suggestion that the employment of the maker of the statement by one of the parties necessarily made him interested. This was already clear from another case cited in the judgment, yet various

3 Taylor, *A Treatise on the Law of Evidence* (1931), i, pp. 557–559.
4 *e.g.*, Wigmore, *A Treatise on the Anglo-American System of Evidence* (1940), v, p. 437. See also nn. 15 and 16 below.
5 But see Phipson, *The Law of Evidence* (9th ed. 1952), pp. 288, 289.
6 Theoretically the Act has also to be applied by lay magistrates, but in practice their limited civil jurisdiction cannot usually involve the relevant provisions.
7 For some discussion of the relation between these two subsections, see Cowen and Carter, *Essays on the Law of Evidence* (1956), pp. 24, 25.
8 Halsbury, *The Laws of England* (1952–), xv, pp. 318, 319.
9 *Plomien Fuel Economiser Co., Ltd.* v. *National Marketing Co.* [1941] Ch. 248, at p. 251.
10 *Holton* v. *Holton* [1946] 2 All E.R. 534; *The Atlantic and The Baltyk* (1946) 62 T.L.R. 461; *Galler* v. *Galler* [1955] 1 W.L.R. 400. See also *In the Estate of Hill* [1948] P. 341 (cited in the judgment); *In the Estate of Powe* [1956] P. 110.

other reported cases have held employees to be interested when their conduct or reputation as workers might be impugned. One writer finds in the cases two schools of thought, the first insisting on a complete absence of bias (to make a person disinterested), and the second requiring a substantial material interest to make him interested.[11] Certainly there are dicta in the Court of Appeal which also show a disparity of approach,[12] but the decisions and dicta of the appellate courts and judges do little to clarify the law, beyond the general statement in *Friend* v. *Wallman*,[13] which was not cited in *Kelleher's* case, that "interested" means personally interested in the result of the proceedings. This statement clearly includes the prospective or actual parties, but it leaves indefinite the nature of the interest of a casual witness of some incident or any other person. Such an interest seems to depend upon the subject of the proceedings and the relation of the maker to the event, in other words, upon the circumstances of each case. It is not possible in this note to discuss all the reported cases, but their effect has been summarised elsewhere.[14] In the present state of the law examples will probably continue to multiply.

It is undesirable that a comparatively recent subsection should form the nucleus of a mass of case-law, or, in the words of the Evershed Committee, "a new legal battle ground."[15] It is even more undesirable when the subsection embodies a dubious policy. For over a century both the legislature and the courts have spasmodically approved the admission of hitherto inadmissible evidence, though the factors which previously made it inadmissible naturally affect its cogency when received. An obvious example is to be found in the successive statutes between 1833 and 1869 which abolished the incompetency of interested persons as witnesses in civil cases, and those between 1872 and 1898 in relation to competency in criminal proceedings. So far as any policy is discernible, it is that invalidating elements in evidence affect cogency rather than admissibility. It is therefore surprising that a reforming statute should have reverted to an emphasis upon inadmissibility, and still more surprising that the ground of inadmissibility was interest. Some of the reformers of 1938 did not apparently appreciate that a competent tribunal can discount bias, once established, in a deceased declarant just as well as in a living witness. However, it is gratifying to note that the reformers of 1953 have recommended the repeal of the offending subsection,[16]

[11] Cross, *Evidence* (1958) pp. 455, 456. The words in brackets do not appear in the text.

[12] Compare *Robinson* v. *Stern* [1939] 2 K.B. 260, at pp. 268, 269; *Jarman* v. *Lambert & Cooke Contractors, Ltd.* [1951] 2 K.B. 937, at p. 940.

[13] [1946] K.B. 493, at p. 500, C.A.

[14] Halsbury, *loc. cit.*

[15] *Final Report of the Committee on Supreme Court Practice and Procedure* (1953: Cmd. 8878), p. 93, para. 274.

[16] *Ibid.*, pp. 93, 94, 106, 325, paras. 272–274, 276, 320 (9).

and it would be encouraging if their recommendation were carried into effect without excessive delay.

G. D. Nokes.

Public Rights and Planning Control

A system of planning control is inherently weak if the machinery for preventing unpermitted development is slow and ineffective. Each of these vices is shown by the enforcement machinery of the Town and Country Planning Act, 1947, when it is sought to secure the discontinuance of an unpermitted use of land.[1] A summary of the procedure will make this clear. An enforcement notice cannot take effect for at least twenty-eight days after it is served.[2] At any time during that period the recipient may apply to the local planning authority for permission to continue the unpermitted use; and in the event of a refusal he has another twenty-eight days within which he may appeal as of right to the Minister. The determination of the appeal seems to take at present an average of three to four months from the date on which it was lodged. Pending the determination of the application and appeal the operation of the enforcement notice is suspended.[3] With an exact understanding of the possibilities open to him the recipient of a notice should be able to delay its effectiveness for at least six months. Unfortunately these possibilities are well known to the numerous persons who seek to profit from the large unsatisfied demand for caravan sites. For good or ill it is difficult to obtain permission to use land as a caravan site in either an urban or a coastal area. It is or (if the case under review is good law) was, easy (and profitable) to use land in those areas for caravan purposes in open and legitimate disregard of the planning authority's policy. In the simplest case a site could be used for six months[4] before the authority could take criminal proceedings for non-compliance with their enforcement notice.[5] If it is desired to provide the caravan owners with longer term accommodation then the operation is more elaborate because mobility and three or four fields are required. The first field can be used for six months,[4] at

1 See generally, Megarry, "Enforcement Notices: Bruta Fulmina of the Planning World," 73 L.Q.R. 506 (1957). The complex body of case law on the subject is conveniently set out in [1956] J.P.L. 634 and [1958] J.P.L. 628.

2 Town and Country Planning Act, 1947, s. 23 (3).

3 *Ibid.*, s. 23 (3) (*a*).

4 In areas where the permission to use land for any purpose for twenty-eight days in any one year given by Art. 3 of the Town and Country Planning General Development Order 1950 is in force, the period will be nearer seven months. See *Godstone R.D.C.* v. *Brazil* [1953] 2 All E.R. 763 (D.C.).

5 The penalties imposed in such proceedings may be heavy. The maximum fine is £50 on first conviction and £20 for each day on which the use is continued after the first conviction (Town and Country Planning Act, 1947, s. 24 (3)). If the fine is ineffective an injunction may be obtained, see *Att-Gen.* v. *Bastow* [1957] 1 Q.B. 514.

the end of which time the caravans must be moved for a six months' sojourn in the second field and so on. At the end of eighteen months or two years the cycle may perhaps be started afresh.[6]

It was an operation of the second type—which gives pungency to the legislative description of a caravan as a "movable dwelling"[7]—that was the subject of the proceedings in *Att.-Gen.* v. *Smith*.[8] The defendants had been ringing changes in the area of the Egham U.D.C.; and the council, whose powers were useless in face of the defendant's mobility and ingenuity, brought a relator action for an injunction to restrain the defendants from using any land within their district as a caravan site without previous planning consent. The action was a novel one, but Goddard C.J. granted the injunction as claimed.

There is authority for the proposition that the Attorney-General may be granted an injunction to restrain a breach of statute even although the statute itself provides penalties for the breach.[9] The only limitation on this proposition (apart from the court's inherent discretion) is the indefinite one that the breach must constitute the infringement of a "public right."[10] In the present case the Lord Chief Justice held that the 1947 Act

> "is an Act which is designed to confer a benefit on the public: it is for the orderly development of the countryside, to prevent unsightly development . . . and so forth. It is obviously an Act which is designed for the public good and can be used for great public advantage."[11]

With this opinion one may respectfully agree; but the public can enjoy no greater benefit than is given to it by Parliament, and if the statute is not broken the benefit cannot be imperilled. It is submitted with respect that none of the material steps taken by the defendants was a breach of the 1947 Act. The only step in respect of which this submission is doubtful is the initial act of using the land without permission, but the argument of the defendants on this point[12] appears a formidable one:

> "Section 12 (1) of [the Act] does not say that permission shall be required 'before any development is carried out' but 'in respect of any development' and its words should not be

[6] This is doubtful. See *Postill* v. *East Riding County Council* [1956] 2 Q.B. 386 (D.C.), and *Fyson* v. *Bucks C.C.* [1958] 1 W.L.R. 634 (D.C.) as to when resumption of a prior use constitutes fresh development.

[7] See, *e.g.*, Public Health Act, 1936, s. 269.

[8] [1958] 3 W.L.R. 81; also reported at [1958] 2 All E.R. 557.

[9] *Att.-Gen.* v. *Ashborne Recreation Ground Co.* [1903] 1 Ch. 101; *Att.-Gen.* v. *Wimbledon House Estate Co.* [1904] 2 Ch. 34; *Att.-Gen.* v. *Bastow* (*supra*).

[10] See Devlin J., *Att.-Gen.* v. *Bastow* (*supra*) at p. 519.

[11] [1958] 3 W.L.R. at p. 92.

[12] *Ibid.*, at p. 86.

> equated with 'it shall be unlawful to carry out any development unless permission has previously been granted.' Such a construction would be inconsistent with section 18 which clearly envisages the carrying out of development without permission. . . . Development without permission . . . merely puts the developer to the risk of having the development prohibited if the planning authority acting administratively so decide." [13]

To this it may be added that the sections dealing with enforcement do not speak of "development carried out in contravention of the Act" but of "development carried out without the grant of permission." The Lord Chief Justice did not in terms deal with the provisions which the defendants had broken, but after reciting the history of their actions he said:

> "That shows an intention by the defendants, who have been refused planning permission time and time again, to act in defiance of the Town and Country Planning Act, and to use its machinery not for the purpose of making genuine applications for permission but for the purpose of delay." [14]

This critical passage equates defiance of a statute and "improper" use of its provisions as tantamount to a breach of statute. This is an extension of the established proposition which in the circumstances of its application cannot but at least call to mind the aphorism that "hard cases make bad law." At a time when the legislature sees fit to regulate an increasing number of activities the most formidable possibilities are inherent in judicial control of "defiant" conduct which is not *per se* unlawful. Whether or not these possibilities are to be welcomed is a matter for individual opinion, but two comments may be made on the present case. First the decision marks a change from the hitherto prevalent judicial approach to the 1947 Act which has been based on a desire to construe restrictively legislation which encroaches upon private rights.[15] Secondly the case draws attention to the need for an amendment to the enforcement machinery of the 1947 Act. Even if the decision is right a relator action is neither a simple nor an inexpensive method of stopping unpermitted development. The Government apparently has in mind a number of amendments to the Planning Acts,[16] and all planning authorities must hope that amongst them is something to relieve their impotence.[17]

MICHAEL MANN.

[13] The planning authority may serve an enforcement notice only if they think it expedient so to do "having regard to the provisions of the development plan and to any other material considerations" (s. 23 (1) of the 1947 Act).

[14] [1958] 3 W.L.R. at p. 93.

[15] See, *e.g.*, *East Riding County Council* v. *Park Estate* (*Bridlington*) *Ltd.* [1957] A.C. 223 at p. 233 *per* Lord Simonds.

[16] Official Report (H.L.) Vol. 209 (No. 67) col. 294 (May 13, 1958).

[17] One authority has recently obtained additional powers in relation to enforcement proceedings against caravan sites, see Surrey County Council Act, 1958, s. 48 (6 & 7 Eliz. 2, c. xlii).

Fair Comment on Privileged Statements of Fact

One of the points involved in *Addis* v. *Odhams Press, Ltd.*[1] was whether the defence of fair comment is open to the defendant in an action of defamation where the statement of fact on which the comment is based is false but privileged.

Grech, one of the plaintiffs in the action, while serving a prison sentence for housebreaking, composed and sent to the Home Secretary two petitions protesting his innocence, in which he made grave charges against certain police officers and others. Following these petitions, a police officer and two others were prosecuted and convicted of conspiring to defeat the ends of justice. At the trial, one of the accused testified that he had been told by Grech that Addis, the other plaintiff in the action, had assisted him in drawing up one of the petitions. Grech, however, in giving evidence himself, said that the only assistance he had received was by a person he did not name, to correct his grammar and punctuation. In an account of the trial printed and published by the defendants in the *Daily Herald* it was stated that Grech had drawn up the petition "with the help of Jasper Addis" and that "into it he put all the dirt he knew, and as a Maltese running West End flats as brothels he thought he knew a great deal." In fact, Addis did not assist Grech in the preparation of the petition, and this was admitted by the defendants in the consolidated action brought by Grech and Addis.

This note is concerned only with the claim by Addis and the question whether the defendants could plead fair comment on facts they admitted to be false. The action was tried by Donovan J. and a jury. The judge ruled that the words "into it he put all the dirt he knew" were capable of being fair comment on a matter of public interest in the case of both Grech and Addis,[2] and he further ruled that, in the case of Addis, a plea of fair comment was not excluded because the statement of fact on which it was based, that he had assisted Grech, was untrue, so long as the statement was privileged. In the result, the jury found that the words were defamatory of both Grech and Addis and were untrue of both of them, but were, in both cases, fair comment on a matter of public interest. In ruling that a plea of fair comment was open to the defendants on a statement of fact which was untrue, but privileged, Donovan J. followed the earlier decision of Phillimore J. in *Mangena* v. *Wright*,[3] where it was held that statements contained in an official blue book

[1] [1958] 1 Q.B. 310 (Donovan J.); [1958] 3 W.L.R. 16 (C.A.).

[2] The case is also reported on the question whether the words were capable of a defamatory meaning, and, if so, whether it was open to the jury to find that they were fair comment. These questions are more fully reported in the All England Law Reports, *sub nom. Grech* v. *Odhams Press, Ltd.* [1957] 3 All E.R. 556 (Donovan J.); [1958] 2 All E.R. 462 (C.A.).

[3] [1909] 2 K.B. 958.

presented to Parliament could be the subject of fair comment, even though they were untrue.

The Court of Appeal has now allowed Addis's appeal on the ground that the defendants' categorical statement that he had helped Grech to draw up his petition could not be said to be a fair and accurate report of the evidence given at the criminal trial, and a new trial, limited to the question of damages, was ordered.[4] But the Court of Appeal was nevertheless of the same opinion as Donovan J. that "if a statement made by a witness is fairly and accurately reported, and attributed to the witness who made it, then, no doubt, although the evidence given by the witness is afterwards shown to be false, the statement reported can be made the subject of fair comment." [5]

One may venture to hope that this is not the final word on this question. The defences of privilege and fair comment have always been grounded on public interest, but it is hard to see that the public interest is served by a general rule allowing fair comment on any privileged statement of fact. To say that privileged statement of fact can be made the subject of fair comment is, of course, ambiguous. It may mean that comment is permissible on the fact that the statement was made by the person who made it, such as comment on the fact that a statement is made in Parliament by A or evidence given at a trial by B. In such a case, the ordinary rule that the facts on which the comment is based must be truly stated or indicated is satisfied by proof that the statement was in fact made. It would clearly be ludicrous in such a case to require proof that the statement commented on is true, since lack of belief in its truth is often the occasion for the comment. But what is more often meant by saying that a privileged statement may be the subject of fair comment, even though it turns out to be untrue, is that comment is permissible on the basis that what was said is true, and this is clearly what was meant by the Court of Appeal in the extract quoted from *Addis* v. *Odhams Press, Ltd.* It is only this aspect of the rule which gives rise to any problem.

Defamatory statements are often made in Parliament and judicial proceedings under the cloak of absolute privilege. The public interest is thought to require that a person defamed in such circumstances should have no remedy against the original defamer, and that immunity from liability should further extend to a fair and accurate report by others of what is said, if published without malice. The grievance of a person defamed by such statements is therefore already considerable, and is only slightly mitigated by the fact that defamatory statements made under the cloak of absolute privilege are often discounted for that reason. In such circumstances, can it be seriously contended that the public interest further requires that newspapers publishing reports of what is said

[4] [1958] 3 W.L.R. 16, pp. 22–23.
[5] *Ibid.*, at p. 23.

must be free to interlard their account with comment on the basis that what was said is true? If a witness at a trial imputes the paternity of her child to Bishop X, are we really to believe that the public interest requires that the *Daily Scandal* should be free to castigate the bishop on the basis that the statement is true? If comment is permissible because the statement is privileged, the unlikelihood of its being true will not avail the plaintiff unless he can show positively that the defendant did not honestly believe it to be true, which would not in practice be easy to prove. A good part of our modern press is disposed to believe the worst of everyone, for the good reason that scandal has better news value than good works.

It is a pity that neither Donovan J. nor the Court of Appeal was apparently referred to the decision of the High Court of Australia in *Bailey* v. *Truth & Sportsman, Ltd.*,[6] where Dixon J. powerfully stated the case against a rule which would allow fair comment on a false statement of fact on the basis that it is true, merely because it is privileged. Dixon J. was, it seems, against ever allowing a plea of fair comment in such a case.[7] This may be going too far. A case may perhaps be made out for allowing fair comment where the statement in question is of the nature of a finding or conclusion of a tribunal or other body entrusted, by law or consent, with a fact-finding function, even though it turns out to be false. This is, however, a far cry from allowing fair comment on every privileged statement, and particularly on a statement by a witness in judicial proceedings. It needs to be remembered that a person who comments on a statement on the basis that it is true, not merely adds his injurious comment to a pre-existing defamatory statement by another, but lends his authority to the view that the statement is true, and so may encourage others to believe what is stated. He should therefore not be exempt, save only in exceptional cases, from the ordinary requirement that he should prove the truth of the facts which he impliedly asserts. In *Addis's* case, the statement that Addis helped Grech in the preparation of his petition came from a person who was convicted at the trial of conspiring to defeat the ends of justice, and so not from a person likely to be believed by many of those who read a fair and accurate report of the trial. The defendants, however, by commenting on his statement on the basis that it was true, by implication lent their authority to the view that it was, and may therefore have encouraged their readers to believe what otherwise they would not have believed.

One further point arising out of this case perhaps deserves some mention. The defence of fair comment is available only on matters

[6] (1938) 60 C.L.R. 700.

[7] He did, however, say that comment might be excusable if avowedly hypothetical or contingent on the statement being well founded: 60 C.L.R. 700 at 723.

of public interest. Donovan J., as we have seen, ruled that the words in question were capable of being fair comment on a matter of public interest, as being concerned with the administration of justice, and this aspect of his ruling was not challenged on appeal. Unfortunately, however, his summing-up does not make clear in what way the defendants were commenting on the administration of justice. Here again one needs to distinguish between comment on the fact that a statement is made by a witness and comment on a statement on the basis that it is true. Comment of the first sort would clearly be on the administration of justice, but not, as a general rule at least, comment of the second sort. If a witness at a trial states that X is the father of her child, comment on the basis that the statement is true can hardly be justified as being comment on the administration of justice. On general principle, it would have to be shown that the conduct imputed to X is itself a matter of public interest. In ruling that the administration of justice was involved, Donovan J. may have meant that it was involved in sending petitions to the Home Secretary and making charges against police officers and that comment on the sending of a petition was for that reason on a matter of public interest. But his ruling is also open to the interpretation that comment was permissible simply because it was founded on something said in the course of judicial proceedings. Since the comment in *Addis's* case was on the basis that what the witness said was true, this interpretation would be open to objection for the reasons given.

DOUGLAS PAYNE.

CONTRIBUTORY NEGLIGENCE AND A DILEMMA

IN his *Joint Torts and Contributory Negligence*, at pp. 361–362, Dr. Glanville Williams suggested that the "agony of the moment" rule like the doctrine of the "last opportunity" was no longer needed since the Law Reform (Contributory Negligence) Act, 1945, "except to the extent that it is an application of the ordinary rule as to the standard of care in negligence," *i.e.*, the mere fact that the plaintiff could show that he was agitated and confused by the defendant's negligence would not automatically exclude any question of contributory negligence, but if the plaintiff were found to have contributed to the harm which befell him then there should be some apportionment of damages. Dr. Williams also made the point (not yet sufficiently insisted upon in some of the textbooks) that the "agony of the moment" rule is merely a special case of a wider rule, which he termed the "dilemma" principle, which applies even though the plaintiff has time to consider the situation in which he is placed. *Clayards* v. *Dethick* (1848) 12 Q.B. 439 and *Summers* v. *Salford Corp.* [1943] A.C. 283 are given as examples of the

" dilemma " principle which Dr. Williams states is to the effect that " a plaintiff who acts reasonably in a dilemma is not guilty of contributory negligence merely because he chooses a course that turns out to be the worse one and to aggravate the injury."

It is submitted that the books would give a far more accurate picture of the law in this field if it were stated in these " dilemma " terms, rather than with the misleading emphasis on alarm and agony. Perhaps the somewhat unsatisfactory speech of Lord Sumner in *Singleton Abbey S.S.* v. *Paludina S.S.* [1927] A.C. 16 in which he stressed " instant action on the first alarm " has been responsible for this distortion.

However this may be, Dr. Williams' prediction as to the handling of the " agony " rule in conjunction with apportionment legislation has now been practically fulfilled in the recent Court of Appeal decision in *Sayers* v. *Harlow U. D. C.* [1958] 1 W.L.R. 623; 2 All E.R. 342. Although, as Evershed M.R. pointed out (2 All E.R. 344), this was not an " agony " case, it was most certainly a " dilemma " case. Two well-known " dilemma " authorities, *Jones* v. *Boyce* (1816) 1 Stark, 493 and *Adams* v. *Lancs. & Yorks. Ry.* (1869) 4 C.P. 739 were considered in the judgments, the first, an " agony " case, being applied and the second distinguished. *Clayards* v. *Dethick* and *Summers* v. *Salford Corp.* were cited in argument.

The facts of *Sayers'* case, which are probably too notorious to require full rehearsal, were that the plaintiff, a Mrs. Sayers, whilst waiting with her husband for a bus due in twenty minutes, entered a public lavatory owned and operated by the defendant council. She was unable to leave the cubicle because the inside handle of the door was missing. No warning had been given of this and there was no attendant at hand. After vainly attempting for ten minutes to attract attention, she decided to see if it would be possible for her to climb out through the space between the top of the door and the ceiling. To do this she stood with one foot on the lavatory seat and the other upon a toilet roll fixture. Finding that it would be impossible to escape in this way, she began to climb down and, as she was doing so, the toilet roll revolved, upset her balance, and she fell to the floor injuring herself. The county court judge held that though the defendants were in breach of duty the plaintiff could not recover. In his view the plaintiff had been in no danger and had not suffered any serious inconvenience. All she had to fear was the wrath of her husband and an hour's delay in her journey. She had taken an extremely dangerous course and he had to balance the inconvenience against the danger. So doing, he in substance decided that she was the authoress of her own misfortune, the case being similar to *Adams* v. *Lancs. & Yorks. Ry.* In that case a railway passenger was not allowed to recover against the company for injuries which he sustained as a result of risky attempts to shut the door of his

compartment whilst the train was in motion because the defective door was not endangering or inconveniencing him and the train was about to enter a station in a very few minutes time.

A unanimous Court of Appeal (Evershed M.R., Morris and Ormerod L.JJ.) overruling the county court judge, held that Mrs. Sayers could recover subject to a reduction of one quarter in the sum she would otherwise have recovered in respect of her contributory negligence. Evershed M.R. said that nothing turned on the foundation of liability. With respect it is much to be regretted that this point was side-stepped so neatly, for Lord Evershed clearly envisaged that the basis of liability might have been a breach of an implied contract (1 W.L.R. 625) and it would have been helpful to have had, at the least, an authoritative dictum on the question, discussed at length by Dr. Williams at pp. 328–332, whether the Contributory Negligence Act applies to negligent breaches of contract. Since the basis of liability was left completely indeterminate the case can hardly be even *sub silentio* authority (if that is authority) for Dr. Williams' view that it does apply to breaches of contract.

Lord Evershed said that the court was confined to the two questions whether the plaintiff's injuries were too remote a consequence of the defendant's breach of duty as not being a natural and probable consequence of it, and, if the damage were not too remote, had the plaintiff been guilty of contributory negligence warranting some apportionment of damages. All the members of the court were agreed that the inconvenience suffered by Mrs. Sayers was greater than the county court judge had estimated it to be and the risk that she had taken less, and, on the whole, not disproportionate to her predicament. In analysing *Adams'* case Lord Evershed noted the effect of the 1945 Act upon some of the statements of law in that case but neither he nor his brethren seemed to think that they were doing anything revolutionary in applying apportionment in a "dilemma" case. In fact the same course had been taken by the Court of Appeal and the House of Lords in *Billings* v. *Riden* [1957] 3 W.L.R. 496 (where *Clayards* v. *Dethick* was considered) but the fact that the court in *Sayers* adopted this approach as a matter of principle and not on authority demonstrates how fully Dr. Williams' prediction as to the attitude of the courts has been fulfilled. There seems to be no real reason to doubt that this decision applies to "agony" cases properly so-called, as well as ordinary "dilemma" cases, especially since *Jones* v. *Boyce* was one of the cases relied upon. Thus the "dilemma" and "agony" doctrines, as independent rules, seem to have faded away more quietly than the "last opportunity."

Finally some compensation seems to have been offered to the plaintiff in a "dilemma" case for the fact that apportionment will now be applied against him. Lord Evershed's careful elision of the word "very" as qualifying "great inconvenience" and "slight

danger" in a passage from the judgment of Montagu Smith J. in *Adams*' case seems to indicate that apportionment legislation has given the courts confidence to adopt a much more flexible approach to "dilemma" problems and therefore measures of inconvenience and risk which would formerly have barred all recovery may now allow a partial recovery.

A. H. Hudson.

A Good Look Backwards

"It is admitted that this action is without precedent. It is certainly not within any principle that I am aware of; and I am not disposed to introduce it." These words of Cresswell J. in *Revis* v. *Smith* [1] were applied by Lord Goddard C.J. to the decision before him in *Hargreaves* v. *Bretherton*.[2] Indeed he went further, describing the case as "an obvious 'try on'" and "absolutely unarguable." [3] So far as precedent is concerned these observations may be unobjectionable, but it is respectfully submitted that the answer to the question of principle involved is not so obvious.

The case decides, to quote the headnote, that "An action for damages will not lie at the suit of a person who alleges that he has been damnified by false evidence given against him in criminal proceedings." Since it must be conceded that one may be severely damnified through perjured [4] evidence in criminal proceedings, the basis of the decision, except so far as it rests on authority alone, must be that the public interest in preventing actions for damages of this kind outweighs the harm to the individual damnified. Let us examine the arguments advanced in the judgment in favour of this conclusion.

1. There is authority against such an action and none in favour of it. This is so, but to nothing like the extent assumed in the judgment.[4a] However, the main concern of this note is with the question of policy.

[1] (1856) 18 C.B. 126, 141.
[2] [1958] 3 W.L.R. 463, 466. The case is also reported at [1958] 3 All E.R. 122.
[3] *Ibid.*, p. 468.
[4] I am not considering honestly mistaken testimony.
[4a] The only authority directly in point is the century-old case of *Henderson* v. *Broomhead* (1859) 4 Hurls. & Norman 569 (Exchequer Chamber), where a claim based effectively on perjury, as opposed to defamation, failed. It is submitted that the reasoning behind the decision is vitiated by a confusion between perjury and defamation. Perjury is not necessarily defamation. Lord Goddard C.J. also relied on *Watson* v. *M'Ewan* [1905] A.C. 480 (H.L.), *Skinner* (1772) Loffts Reps. 55, and *Revis* v. *Smith* (1856) 18 C.B. 126. The first of these was a slander appeal from Scotland, conspicuous for a dictum by Lord Halsbury at p. 486, which was both *obiter* and too wide. The second was a criminal indictment, not a civil claim at all, equally conspicuous for an inaccurate dictum, this time by Lord Mansfield at p. 56. The third was, if possible, even less relevant, for there was no evidence that the defendant did not believe in the truth of what he had said: see Jervis C.J. at p. 140, and Crowder J. at p. 141. The claim was expressly treated as one based on

2. For "words spoken by a witness 'in office,' which means, of course, for this purpose in giving evidence, he cannot be put to answer either civilly or criminally." [5] As it stands this statement is, with respect, manifestly incorrect in so far as it refers to criminal liability. Later in the same judgment the crime of perjury is mentioned. There is also the possibility of contempt in the face of the court. In view of this it is worth considering whether a witness cannot in fact be made answerable civilly also. Naturally much reliance is placed on the analogy of a witness's absolute privilege in the law of defamation. It is submitted that this rule is not apt to deal with a case such as the present. The complaint the plaintiff makes about a defamatory statement is that its mere publication damages his reputation. It might be thought that damage to reputation, however uncomfortable, is less serious than a criminal conviction perhaps followed by imprisonment. The complaint made by the plaintiff in *Hargreaves* v. *Bretherton* was not that the allegedly perjured evidence had injured his reputation, but that he had been wrongfully convicted and sentenced to imprisonment as a result of it. The public interest may demand for witnesses an absolute protection against the law of defamation. It does not follow that there should be a similar civil law immunity for perjury. Certainly there are dicta [6] that privilege for all concerned in a judicial proceeding is the general policy of the law. But if this argument is relied upon, the tort of malicious prosecution has to be accounted for.

3. It is said that to allow an action for damages for perjury, at least where there has been no conviction for perjury, is equivalent "by the testimony of one witness in a civil suit [to] convicting a man of a crime of which he could not be convicted in a court of criminal jurisdiction without the concurring testimony of two," [7] and "that it would be most unfortunate if an action for damages for alleged perjury could be brought not only when nobody had been convicted of perjury, but, quite apart from that, merely on the allegations of a person who says that somebody has committed perjury, which led to him being damnified either by being convicted or put on trial." [8] Against this view the following points may be urged. First, with all respect, to lose a civil action for damages is not equivalent, either as to form or as to consequences, to a criminal conviction. Apart from any other consideration it is always open to the criminal court to differ from the civil one. Second, there is nothing to prevent the standard of proof in the

unintentional defamation: see Crowder J. at 141. *Dawkins* v. *Lord Rokeby* (1875) L.R. 7 H.L. 744 (H.L.) was yet another defamation case. These authorities certainly do not support the sweeping assertions in the judgment in *Hargreaves* v. *Bretherton*, and scarcely reinforce the decision.

5 [1958] 3 W.L.R. 465. Lord Goddard here relies on a pronouncement by Lord Mansfield in *Skinner* (1772) Loffts Reps. 55 at p. 56.

6 *e.g.*, Jervis C.J. in *Revis* v. *Smith* (1856) 18 C.B. 126 at p. 140.

7 *Ibid.*, quoted at [1958] 3 W.L.R. 465–466.

8 [1958] 3 W.L.R. 466.

civil action being made as high as in the criminal trial if this is thought desirable. Third, it is not at all clear why anyone should be thought to be able to recover damages on the basis of unsubstantiated allegations in this part of the law any more than in any other part.

4. Cresswell J. thought it "enough to say" that the world had gone on very well so far without such actions and probably would not if they were allowed.[9] Lord Goddard C.J. agreed and feared a flood of litigation by convicted prisoners, especially in view of legal aid.[10] This is the familiar old argument of awful consequences to follow. It is probably safe to say that every significant extension of the law of tort has been greeted with just such prognostications of disaster. They have so far had in common the two characteristics of being based on no evidence and being falsified by events. As far as legal aid is concerned, it may be pointed out that the scheme does not cover defamation actions and may well not be thought to cover an analogous perjury action. Furthermore there is no reason to suppose that a certificate would be given in an unworthy case.

5. Finally his Lordship appears to have taken the view that since perjury is provided for by being made a crime, it is not proper to allow the extraction of damages also.[11] It is respectfully submitted that this is not the policy of the law because there are many legal wrongs which are both crimes and invasions of civil rights and redressible as such.

It seems clear that on the one hand the present law creates, or at least allows the continuance of, an injustice which may be rare but is none the less drastic for that; whilst on the other hand there do not seem to be any sufficient considerations of public interest to compensate for this shortcoming of the law.

C. Howard.

Resale Price Maintenance — Notice to "Non-Signers"

In *Goodyear Tyre and Rubber Co. (G.B.) Ltd.* v. *Lancashire Batteries, Ltd.*[1] the Court of Appeal established the requirement of notice to "non-signer" retailers under section 25 (1) of the Restrictive Trade Practices Act, 1956, strongly in favour of the enforcing manufacturer.

The Goodyear Tyre Co. is a member of the British Motor Trade Association. The latter Association, on behalf of its members, sent out a circular to a large number of motor traders, including the defendants, the relevant parts of which stated: "To: All traders

[9] (1856) 18 C.B. 141.
[10] [1958] 3 W.L.R. 466.
[11] *Ibid.*
[1] [1958] 1 W.L.R. 857. Also reported at [1958] 3 All E.R. 7.

in motor goods TAKE NOTICE THAT . . . (2) The undermentioned manufacturers and concessionaires have authorised the British Motor Trade Association to give notice on their behalf that they each individually supply for resale each of their new products of the kind or kinds specified in the Schedule subject to conditions as to price, including a condition that they shall not be resold or offered for resale at a price other than the appropriate price prescribed by the manufacturer or concessionaire concerned, plus the actual amount of purchase tax (if any) for which such products are liable and such delivery charges as the manufacturer or concessionaire may prescribe. . . . (4) Details of the conditions as to price prescribed for any of the specified products may be obtained on application to the manufacturer or concessionaire concerned, quoting details of the goods in question." [2] The Schedule contained a long list both of tyre manufacturers (including the plaintiffs) and of manufacturers of motor-cars and motor accessories, and included in the list of " specified products " all Goodyear tyres, tubes and flaps.

A couple of months after receipt of this circular, defendants sold Goodyear tyres at a ten per cent. discount below the manufacturer's prescribed list prices.[3] The action was for an injunction under section 25 (1) to restrain breach of Goodyear's resale price maintenance conditions.

Section 25 (1) provides that a retailer who obtains goods " with notice of the condition " as to the price at which those goods may be resold, may have such condition enforced against him directly by the manufacturer " as if he had been party " to the original contract between manufacturer and wholesaler. Does " notice of the condition " mean full notice of the exact nature of the resale price conditions or simply notice of the fact that resale price conditions attached to the goods in question " at all events when the notice contains directions as to how information as to the details can be obtained " ? [4] The Court of Appeal approved the latter interpretation.

In adopting this interpretation of the Act the court had recourse to the none too happy analogy of the " railway ticket " cases, where, of course, the law is that an express reference on the ticket to conditions and where they may be consulted is sufficient (other things being equal) to incorporate those conditions into the contract of carriage, etc. Though the court expressed itself to be fully aware of the fact that incorporation by reference in a ticket must take

[2] At p. 859.

[3] The retailer must, under the Act, have or have had notice of the resale price condition at the time of acquiring the goods in question. In *Dunlop Rubber Co., Ltd.* v. *Longlife Battery Depot* [1958] 1 W.L.R. 1033, Lloyd-Jacob J. appears, with respect, to have overstated the jurisprudential consequences of such notice, remarking that, as its result " a conscious restriction of freedom to deal in the goods is to be imputed to the sub-purchaser *as a term of his contract* " (at p. 1040: italics added).

[4] At p. 866. See also p. 863.

place at the formation of the relevant contract, while the rule in section 25 (1) has nothing to do with contract formation, being the latest exception to privity of contract, the mere awareness of this distinction does nothing to reduce the awkwardness, the inappropriate nature of the analogy. If it has any value, it must needs be a one-way analogy—or could British Transport Commission by adequate publicity of the existence of terms and conditions of carriage and where they might be found incorporate those terms into its contracts without further need to observe the law of offer and acceptance?

Be this as it may, however, the decision in *Goodyear Tyre* does enormously facilitate the practical administration by business of the resale price maintenance provisions of the 1956 Act. Though the provision in section 25 (1) cannot be considered unambiguous, the interpretation adopted was certainly a legitimate one, and, since it was the policy of Parliament in 1956 that resale price maintenance should be permitted, the interpretation adopted may certainly be regarded as " a matter of commercial common sense." [5]

All that the Court of Appeal decision now leaves open is the time at which a " floating " notice by a trade association crystallises in the case of an individual transaction, where prescribed prices are increased subsequent to the general notice but before the individual transaction. If the " non-signer " on receiving a general notice obtains the current prices of the manufacturer, may he rely on those prices until he receives specific notice to the contrary? Surely, in fairness, he should be able to rely on them. But, suppose he never inquired: is he bound by the prices prevailing at the time of the general notice, or at the time of his individual transaction? Only further litigation can tell.

C. Grunfeld.

[5] At p. 867.

REVIEWS

LAW AND ORDERS. An Inquiry into the Nature and Scope of Delegated Legislation and Executive Powers in English Law. By SIR CARLETON KEMP ALLEN, M.C., Q.C., D.C.L., F.B.A., J.P., of Lincoln's Inn; sometime Professor of Jurisprudence in the University of Oxford; Fellow of University College, Oxford. Second Edition. [London: Stevens & Sons, Ltd. 1956. xxv and 482 pp. 42s. net.]

ADMINISTRATIVE JURISDICTION. By SIR CARLETON KEMP ALLEN. [London: Stevens & Sons, Ltd. 1956. 101 pp. 15s. net.]

LAW IN THE MAKING. By SIR CARLETON KEMP ALLEN. Sixth Edition. [Oxford University Press. 1958. xxxix and 643 pp. 50s. net.]

SIR CARLETON ALLEN is a master of the English language, and makes Administrative Law more interesting than anyone else. No mere academic lawyer, he has judicial and administrative experience. His political leanings are confessedly "to the Right," though we should describe his general attitude to the problems discussed in *Law and Orders* as liberal or even libertarian. Much has happened in English administrative law since the first edition of this well-known and stimulating book appeared in 1945. The new edition has been rewritten and greatly expanded to cover such topics as government by emergency regulation after the end of the war, the Statutory Instruments Act and the working of the Select Committee on Statutory Instruments, the marked increase in Public Corporations, the reports of the Select Committees on Parliamentary Procedure (1946) and Delegated Legislation (1953), the Crown Proceedings Act, the *Boundary Commission* cases and the *Wentworth Estates* case. Since its publication there have been the report of the Franks Committee and the Administrative Tribunals and Enquiries Bill, and the decision of the House of Lords in *Smith* v. *East Elloe R. D. C.*

Some comment may be appropriate on the scope and arrangement of *Law and Orders*. The principal topic, as stated in the preface, is delegated legislation, and this is the main subject of the first six chapters. The sub-title, however, adds "and Executive Powers." Chapters 7 and 8, entitled "The Courts and Delegated Legislation," in fact cover remedies against public authorities. Thus we find a discussion of mandamus, prohibition and certiorari. Chapter 9, entitled "The Public and the Executive," deals with the civil service, and Chapter 10 with the Crown in litigation. The preface adds that a corollary to the main theme of delegated legislation is the question of its interpretation and application through judicial agencies. Hence Chapter 8 discusses cases on "natural justice," though the description of judicial agencies is relegated to a separate volume (noticed below). In fact, in many passages Sir Carleton uses the expression "delegation" rather than "delegated legislation." Chapter 11, besides discussing proposals for the reform of administrative tribunals, examines the nature of "administrative," "judicial" and "legislative" functions. Here the theoretical distinction between the kinds of governmental powers is admitted, but the problem is found to be that of hybrid functions. Appendix 4, on "Crown privilege" in litigation, conveniently quotes Lord Kilmuir's statement in the

House of Lords on June 6, 1956. Appendix 2 sets out a full report of the appalling case of *Odlum* v. *Stratton*, which may lead lawyers who already subscribe to the *Estates Gazette* to take in the *Wiltshire Gazette* as well.

There is not room in a review to mention all the good things in this book, which Sir Carleton appears to have enjoyed writing, while to mention some (*e.g.*, legislation by reference, pp. 200 *et seq.*) might be thought to imply the exclusion of others. Among Sir Carleton's useful proposals are: a Select Committee to scrutinise Departmental "quasi-law" (p. 223); a hearing in Chambers where the Crown objects to the production of documents (p. 384); as regards administrative jurisdiction, legislation to prescribe what is to be justiciable and by what means (p. 396); and a supplement to the Crown Proceedings Act to define "Crown status" (p. 405).

His penetrating and eloquent criticisms of the cases are written with the zeal of an advocate on behalf of individual liberty rather than with a judicious appreciation of the policy behind the statute; and yet he sometimes attacks the Departments who drafted the legislation or the judges who interpret it, when the real culprit is the Parliament which passed or affirmed or failed to annul it. And is he quite fair in his criticism of the *Stevenage* and *Plymouth* cases, as compared with *Errington* v. *Minister of Health* (pp. 280–293)? The reader needs to be made aware that different Acts with different policies are involved, that they are drafted in different terms so as to confer different Ministerial functions and to prescribe different kinds of procedure. Where a statutory function is classified as "administrative," the courts nowadays clearly recognise the responsibility of Ministers to Parliament. Is there the same kind and degree of responsibility in the France of the *droit administratif*? Incidentally, section 10 (3) of the Town and Country Planning Act, 1947, expressly nullified the principle of *Errington's* case so far as Ministerial approval of development plans is concerned. To the sequel of the Crichel Down affair (pp. 343–351) it may be added that the Minister of Agriculture, although not personally implicated, resigned. As regards the *Amphitrite* case (p. 368), why are legal authors so sceptical of the argument that the Crown's statement was a mere expression of intention and not a promise purporting to affect legal relations? The distinction is accepted as elementary in the private law of contract. On the other hand, Appendix I on "Detention under Regulation 18B" compels our sympathy for Liversidge (alias Perlzweig), in spite of the support we have hitherto given to the eight judges who decided in favour of the Home Secretary.

While preparing a new edition of *Law and Orders*, Sir Carleton set out to survey the various kinds of administrative jurisdiction. The material collected threatened to throw the book out of balance and was therefore made into a separate work under the title *Administrative Jurisdiction*. This was published as a long article in the first number of *Public Law* (1956, pp. 13–109), and then reissued as a slender book with the same format as the periodical though with slightly different pagination. Personally we would rather this material had been incorporated into *Law and Orders*, at whatever risk of unbalance, as we should then have had "Allen on Administrative Law" under one cover. However, the decision having been made, we accept it and are grateful for *Administrative Jurisdiction* with its outline of over one hundred types of administrative tribunal and Ministerial decision. Brave industry was needed to survey this field before the Departments had presented their memoranda to the Franks Committee. Rent tribunals are not criticised, but hard words are said about Agricultural Executive Committees and we meet the unfortunate but courageous Mr. Odlum again (pp. 18–21). In his general observations, Sir Carleton discusses the number, complexity and composition of tribunals, the problem of manning them, procedure, evidence and appeals. His later views on reform will be found in the Minutes of Evidence of the Franks Committee (Appendix I, pp. 3–4) and in Appendix II to the new edition of *Law in the Making*.

Law in the Making has been essential reading for students of Jurisprudence in this country for the past thirty years. Indeed, the book has been said to be worth three questions in any Jurisprudence paper. This scholarly, gracefully written work appears now in its sixth edition, beautifully produced at the Clarendon Press. Compared with those made in the previous edition the changes in the new edition are not great. There are new sections on Codifying and Consolidating Acts (pp. 461–463) and on Declaration and Injunction (pp. 561–562), and there was just time for the learned author to add his observations on the Report of the Franks Committee (Appendix II). He regrets that the Committee did not advert to the limitations on the remedies of injunction and certiorari, but thinks that the proposed Council on Tribunals will exert an admirable influence on our administrative law. However, the Franks Committee was not empowered to consider "enabling" legislation, and it is there, in Sir Carleton's opinion, that the crux of the problem of delegated powers lies.

Sir Carleton uses the expression "sources of law" to mean "those agencies by which rules of conduct acquire the character of law by becoming objectively definite, uniform, and, above all, compulsory" (p. 1). Salmond's distinction between "formal" and "material" sources was discarded in an earlier edition. There are in our opinion four different senses in which the expression "sources of law" is regularly used, and it is not clear how Equity comes to be regarded as a source of the same category as custom, judicial precedent and legislation (*cf.* pp. 63, 387–388). "Equity," when it does not stand for a branch of English law comparable to the common law, seems to us to represent a source of law comparable to the ideas of reasonableness, natural justice, etc.; in other words, it is one of the "material" sources. However, Sir Carleton is not writing a textbook and he eschews formal classifications. He interests us because he writes about what interests him. And so he says interesting and important things about Equity as about the other sources with which he is concerned.

There are one or two statements that might possibly mislead. Although hedged about with qualifications both in the text and in the footnote, the statement at p. 494 to the effect that an expression which has once been judicially interpreted must bear that meaning "*in all subsequent statutes*" (the author's italics), is surely too wide. The rule could only apply to statutes *in pari materia*. Prohibition is said at p. 560 to differ from certiorari only in the fact that it can be brought at an earlier stage of the proceedings complained of. As pointed out at pp. 558–559, however, certiorari is not confined (like prohibition) to want or excess of jurisdiction, but may issue where an error of law appears on the face of the record. At p. 562 it is said that declaration may be available even though another remedy is open to the plaintiff, *Vine* v. *National Dock Labour Board* being cited as authority. This might suggest that the remedies are alternative, but the House of Lords in *Vine's* case held that in the circumstances damages would not be an *adequate* remedy.

O. Hood Phillips.

The Development of Constitutional Guarantees of Liberty. By Roscoe Pound. [Yale University Press. London: Oxford University Press. 1957. 207 pp. 28s. net.]

It is always a special pleasure to welcome a new book from the pen of the great Roscoe Pound. This one consists of lectures delivered at Wabash College as long ago as 1945, publication having been delayed for over a decade by the necessity "to eke out a professor's retiring allowance by a succession of remunerative undertakings." The view is broad, the vision clear, and the style easy and attractive. At the end of the two chapters on medieval,

Tudor and Stuart England, Dean Pound says: "Much logical acrobatics has been indulged in in order to push the present English doctrine [of Parliamentary sovereignty] back into the medieval cases" (p. 54). The same might be said of the present American doctrine of the avoidance of statutes as contrary to fundamental law. Dean Pound adheres to what we may call the McIlwain school. Chapter 2 of *The High Court of Parliament* (1910) proclaimed the medieval common law as fundamental law, though McIlwain quoted mainly extra-judicial writings. Pound, like him, reveres Coke's *Second Institute,* the seventeenth-century commentary on Magna Carta, though Pound looks at the cases directly as well as through Coke's eyes. Coke as a legal historian has not such a high reputation on this side of the Atlantic as he has on the other. Holdsworth's judgment that Coke had the mind of an advocate, though his misrepresentations of legal history were probably unintentional, seems fair. The more recent researches contained in Gough's *Fundamental Law in English Constitutional History* suggest that, although statutes were sometimes nullified by the courts in the fourteenth century for technical reasons, the only fifteenth-century case in which the courts clearly held a statute void was *Rous* v. *The Abbot,* or *Annuity 41* (1450), but this was because the statute—if construed in a technical manner—was impossible to be applied. In the sixteenth century we have *Lord Cromwell's Case* (1578), but this was a private Act and it is not certain what Coke meant by "void." When Coke talks about the courts "controlling" Acts of Parliament, he may well be referring to interpretation that leads to logical inconsistency or impossibility of performance.

Whatever the "true" history of the matter in the English period, it is a fact that American constitutional theory has inherited one interpretation of Coke's version. On that basis Dean Pound's chapters on American Colonial, State and Federal constitutions are full of interest. Practical as well as theoretical considerations are brought out in discussing the three separate though related topics of fundamental law, declarations of rights and judicial review. Judicial review traces its origin partly to the practice of appeals to the Privy Council concerning *ultra vires* Colonial legislation, although it appears from J. H. Smith's *Appeals to the Privy Council from the American Plantations* that more frequently Colonial Acts were disallowed by the Crown. The early Bills of Rights drawn up in the new American States often owed their content to special local experience rather than political theory; and the separation of powers in the first American constitutions was directed against the concentration of power in the hands of the Governor and Council locally, and of the Privy Council in London.

Nearly half the book consists of source materials illustrative of the text, notably extracts from reports of early English cases, Coke's commentary on Magna Carta, limitations on legislative power contained in American Colonial Charters, and early American State Declarations of Rights. The American material will be of particular value to the more advanced student. It would have been convenient if cross-references had been inserted from the text to the sources.

O. Hood Phillips.

Pakistan: The Development of its Laws and Constitution. By Alan Gledhill, m.a., i.c.s. (Retd.), of Grays Inn, Barrister-at-Law; Professor of Oriental Laws, School of Oriental and African Studies, University of London. [London: Stevens & Sons, Ltd. 1957. 263 pp. £2 5s. net.]

This is Volume 8 of the *British Commonwealth Series,* for which Professor Gledhill has already produced a volume on India which necessarily overlaps some of the earlier chapters. The value of a particular volume in this

series, which seeks to cover the development of legal systems as well as the Constitutions, obviously varies in different Commonwealth countries. For us the Pakistan volume is perhaps the most interesting, since the Constitution is new and this is the fullest commentary so far published here.

We feel that Professor Gledhill, with his experience of the South Asian sub-continent and his sympathetic understanding of its peoples, is a safe guide through the outline history of Islam and the survey of the laws of Pakistan. He points out the autocratic and would-be theocratic nature of the ideal Islamic State. The law now in force in Pakistan is codified, except personal law, tort and conflict of laws. The explanation of these matters involves delving back into the Indian past, where Professor Gledhill is also at home. As regards personal law, we are told of the two main sects and the four recognised schools of law to which the Muslim majority belong. Many Pakistanis are probably not aware of the divergences between Pakistani Law and the rules of the Shari'a, and would not relish the assimilation of the former to the latter if they were. The select bibliography covers mainly the historical and religious background.

In the part on the Constitution readers will profit by the discussion on Pakistan's international status, the constitutional proposals of 1949–52 and the political events and constitutional cases of 1954–55; and the comparisons with the Indian Constitution and the citation of Indian as well as Pakistani decisions concerning the distribution of legislative power, emergency provisions, the President's discretionary powers, fundamental rights and directive principles of State policy. In his summary of Pakistan citizenship (p. 81) Professor Gledhill might have said something about the position of Commonwealth citizens in Pakistan, especially as he mentions on the previous page the position of Pakistani citizens in the United Kingdom. It is said at page 140 that under Article 192 the President may in certain circumstances make an order "suspending the right to enforce" fundamental rights. This expression might be expanded, because in spite of the marginal note to Article 192 the Pakistan Constitution, unlike the Indian Constitution, does not provide for the suspension of the fundamental *rights*; the President may suspend *proceedings* for their enforcement. Does this make any difference when the proclamation of emergency ceases to operate?

O. Hood Phillips.

Parliamentary Sovereignty and the Commonwealth. By Geoffrey Marshall. [Oxford: at the Clarendon Press. 1957. xi and 227 pp. 35s. net.]

> "The language in which propositions about legal sovereignty have been formulated is inevitably a language which leans upon traditional (and questionable) pieces of vocabulary in jurisprudence and political science. Questions, for example, asked about the parliamentary 'sovereign' have been put in the following way. What is sovereignty? What can a sovereign do? What limits can be placed upon its action? Can it bind itself or its successors? And the answers proferred have been that the sovereign body is legally illimitable; that it 'cannot' be bound; that it 'cannot' place limits on its own or future action. But the substitution of such queries as What rules govern and define the legislative process?, or Under what conditions may rules of this kind be revised? (the answers to which need not be determined by any theory about the nature, or power, or commands of 'bodies' or legal entities) may in themselves suggest different answers."

The great merit of Dr. Geoffrey Marshall's book is that it does formulate the fundamental questions in a manner that makes it impossible to answer them plausibly by dogmatic assertions or the incantation of shibboleths. The

empirical development of the British Constitution and the peculiar characteristics of the United Kingdom Parliament have contributed to build up a common illusion that the legal concept of parliamentary sovereignty raises no problem that cannot be disposed of by a few well-chosen phrases. It is not suggested that the prevailing orthodoxy is incapable of being rationally defended—it can be and has been—but rather that its adherents ought at least to be aware of the arguments of the sceptics and heretics and to recognise that they call for answers. A lawyer to whom it has never occurred to doubt the orthodox analysis can hardly fail to recognise the need for a reappraisal of his position after he has read this book.

The proposition that Parliament has unrestricted power to pass any law whatsoever on any subject whatsoever does not imply that the courts are precluded from inquiring whether the body that has purported to legislate *is* Parliament as defined by existing law, and whether its constituent elements have expressed their legislative will in the manner or form prescribed by existing law. Parliament may be *princeps*, but it does not follow that it is *legibus solutus*. The proposition that Parliament cannot safeguard the substance of its enactments from express or implied repeal by itself or its successors does not imply that Parliament is precluded from altering its own constitution (as by abolishing the second chamber or adding a third chamber) or from altering the procedure for legislating (as by prescribing a referendum or a special majority as a necessary part of the process of enacting certain laws) in such a manner as to make recourse to the former mode of legislating ineffective in law. It is true that (as Salmond perceived) if Parliament can effectively determine the manner in which its own legislative power shall in future be exercised there is no logical absurdity inherent in the proposition that it can effectively determine the future content of its legislation (*e.g.* by making an Act unrepealable, or by renouncing competence to legislate in relation to prescribed matters). Nevertheless, there is no doubt that the English courts would refuse to pursue logical analysis to such a conclusion; and there would be excellent reasons of policy for their refusal.

Once it is recognised that the courts may have jurisdiction to determine whether Parliament has expressed its legislative will in the manner prescribed by law (including law prescribed by Parliament itself) there arise a number of consequential problems to which no firm answer can be offered. What criteria should be applied to discriminate between mandatory and directory procedural rules; or between matters of procedure and matters of substance? In what circumstances (if any) may a court look beyond the parliamentary roll in investigating whether mandatory procedural requirements have been complied with? Can Parliament effectively make an irrevocable renunciation of part of its *territorial* sovereignty; and if so, how?

At this point one reaches the series of problems posed by the wording of the Statute of Westminster and subsequent Independence Acts in so far as they deal with the competence of the United Kingdom Parliament to legislate for Commonwealth countries. Dr. Marshall explores these problems thoroughly in the light of the relevant constitutional provisions of each country concerned. In addition, he analyses the main issues that have arisen in each constitutional system in connection with the relationship between the legislatures and the courts. His longest chapter, which occupies almost a half of the book, deals with the constitutional crisis in South Africa; this is a model of clarity and exactitude. The chapter on Canada is also particularly good.

Only in respect of Ireland are there noticeable omissions. Dr. Marshall gives some consideration to the abortive Government of Ireland Bill of 1886 (which purported to establish a new body, the Imperial Parliament, with limited powers that would cease to be exercisable by the existing United Kingdom Parliament), but he does not refer to the Irish Appeals Act, 1783 (whereby Parliament purported to renounce its sovereignty over Ireland),

or to section 1 (2) of the Ireland Act, 1949. If the book had been written a few months later he would doubtless have had a comment to make on the new constitutional régime in Malaya. By section 1 of the Federation of Malaya Independence Act, 1957, the approval of Parliament was given to the conclusion of an agreement between Her Majesty and the Malay Rulers for the establishment of the Federation of Malaya as an independent sovereign country within the Commonwealth. The agreement could provide for the termination of Her Majesty's sovereignty and jurisdiction in the Straits Settlements and of her power and jurisdiction in the Malay States and the Federation as a whole. The Act made no general provision for future United Kingdom legislation for the Federation. After the Act had become law the Federation of Malaya Agreement was made between Her Majesty and the Malay Rulers. The Agreement, which was annexed to the Federation of Malaya Independence Order in Council, 1957, made under the Act, provided that from August 31, 1957, the Straits Settlements "shall cease to form part of Her Majesty's dominions and Her Majesty shall cease to exercise any sovereignty over them, and all power and jurisdiction of Her Majesty *or of the Parliament of the United Kingdom* [italics supplied] in or in respect of the Settlements or the Malay States or the Federation as a whole shall come to an end." It is unlikely that this formal renunciation of parliamentary sovereignty would be recognised by English courts as legally effective to bar subsequent United Kingdom legislation for the Federation; but it will almost certainly be regarded as effective in the law of the Federation, and appeals from the Federation still lie to the Judicial Committee of the Privy Council. It is not wholly inconceivable, therefore, that the Judicial Committee might one day be required to enter upon the exotic terrain of the *Grundnorm*.

Dr. Marshall's monograph is worthy of the highest praise. He writes as a political scientist, and lawyers may not find his analysis of concepts in the earlier part of the book easy going. But this is a book that should be read particularly by lawyers, for it is one of the most stimulating contributions to the literature of jurisprudence and public law that have appeared in recent years.

S. A. de Smith.

The Modern Law of Real Property. By G. C. Cheshire. Eighth Edition. [London: Butterworth & Co. (Publishers) Ltd. 1958. lxi and 910 and (index) 55 pp. 55s. net.]

Cheshire since the seventh edition has undergone rather more than normal repairs made necessary mainly by new legislation. Readers will remember that the seventh edition embodied major structural changes. Leaseholds, easements and profits, restrictive covenants, rentcharges and mortgages, were all extracted from their earlier positions and put together in a new class called "Commercial Interests." The rearrangement was probably a confirmation of common lecturing practice. The author has now excised from the chapter on the creation of a strict settlement and a trust for sale the treatment of the vesting deed and trust instrument, the statutory definition of a settlement, the overreaching doctrine, the persons entitled to exercise the statutory powers and the persons competent to act as trustees. These subjects appear in Book III. As they are primarily conveyancing matters the rearrangement is logical as well as convenient.

It would be impossible to consider the eighth edition without mention of Professor Hargreaves. The Preface puts him fairly "on the title." The author states his indebtedness to Professor Hargreaves for constructive criticism expressed in the article "Modern Real Property" (M.L.R., Vol. 19, p. 14, 1956) and for more than a hundred detailed criticisms communicated "behind the curtain."

Professor Hargreaves' chief charge against the author was his avowed acceptance (7th ed., pp. 114, 115) of the notion of "ownership" of land. The heretical doctrine, perhaps ultimately derived from those nineteenth-century jurists who went whoring after Roman gods, was quite inconsistent with other parts (*e.g.*, p. 30) of the seventh edition. The abominable opinion has been quietly abjured and the author has done penance by rewriting a large part of the common law doctrine of the estate (pp. 27–36) the general trend of which is indicated by the marginal note (p. 27): "No doctrine of ownership in English land law." It may also be inferred from the dropping of statements which formerly appeared (7th ed., p. 122) that the author has now wholly renounced his dalliance with the Potterian heresy of a fee simple in the permitted use.

"Commercial Interests" have been further refined (pp. xii, 339), leaseholds being put under a separate sub-head from the other members of the genus as the only "Interests conferring a Right to the Land itself." The other members are grouped as "interests conferring a Right Enforceable against the Land of Another."

Five pages have been saved by omitting discussion of the artificial destruction of contingent remainders. There is simply a statement that premature destruction of the particular estate might be brought about artificially by forfeiture, surrender or merger, followed by a statement of the effect of the Real Property Act, 1845 (p. 238). The loss is small. Something had to be cut out to make room for enlargement of other themes.

Mr. J. B. Butterworth has improved the presentation of the Town and Country Planning Act (pp. 121–133), expanded from seven to eleven pages, as well as the treatment of licences (pp. 455–459), expanded from two-and-a-half to five pages. The same learned writer has brought up to date his exposition of the Rent Acts (pp. 838–910). This subject remains in the form of an appendix, presumably in the expectation that some day total repeal will enable the excrescence to be conveniently broken off and laid aside. Part II of the Landlord and Tenant Act, 1954, formerly received only short mention. Now it fills seven useful pages (pp. 381–388).

Before making general criticisms the reviewer must point out a few particular errors and defects. In the Preface the reference (p. vi) to pages 121–133 should be to pages 27–36. The former are concerned with planning, the latter with the common law doctrine of the estate. The umlaut sign is missing from *Re Schär* (p. xxxiii) in the Table of Cases. Why are the precedents of a lease (pp. 388–393) and a legal charge (pp. 557–558) in small light type when the precedents of a conveyance on sale (pp. 660–665), a mortgage by demise (pp. 551–552) and a sub-mortgage (pp. 555–557) are in heavy type? As in previous editions, the verb is missing from the opening sentence of the precedent of the conveyance on sale (pp. 660, 664): omission of "is" assumes a precedent without recitals, which this is not. There is confusion (pp. 619, 620) between "creation" and "transfer." Having correctly stated the distinction (p. 619), the author goes on to include among the "principal occasions of voluntary transfer . . . when the land is . . . (ii) leased, (iii) mortgaged . . ." Lease and mortgage are instances of creation, not of transfer. There is further confusion in the author's classification of Transfers (p. 618) where he makes Transfer Inter Vivos by Act of Parties include Involuntary Transfer. But Involuntary Transfer is equivalent to Transfer by Operation of Law and hence cannot come under the head of Act of the Parties: indeed the author recognises this elsewhere (pp. 620, 621). In Book III, Part V, Chapter II, Married Women are linked with Persons of Unsound Mind and no longer with Lunatics, a change doubtless demonstrative of progress but productive of an inelegant marginal note (p. 821): "Who manages person of unsound mind's property." In the discussion of contingent remainders it is stated (p. 238) that "artificial destruction of the particular estate . . . was finally forbidden by the Real

Property Act, 1845." This statement is inaccurate. Artificial destruction of the particular estate was not forbidden. But destruction of the contingent remainder by artificial destruction of the particular estate was made impossible by that Act (see s. 8). A marginal note (p. 737) to the discussion of the Inheritance (Family Provision) Act, 1938, calls it the "Maintenance (Family Provision) Act, 1938." In *Re Borthwick, Borthwick* v. *Beauvais* [1949] Ch. 395, there was a bequest of an annuity of £250, not a bequest of £250 (p. 740). In the treatment of covenants it is remarkable that *Halsall* v. *Brizell* [1957] Ch. 169; [1957] 1 All E.R. 371, is not found worthy of mention (p. 516): the inference seems justified as two or three later cases are noticed in the book. *Shayler* is printed *Shaylor* (p. 511, n. 1). The author's labours may be lightened by the enactment of a simplified law of covenants before the next edition.

In discussing the Limitation Act, 1939, after statement of the general rule that at the expiration of the statutory period the remedy and title of the former owner are extinguished, two exceptions are mentioned (p. 799), namely settled land and registered land. The latter exception is expressed thus: "Secondly, if the registered proprietor . . . is dispossessed for twelve years, he continues to hold the legal estate until the register is rectified in favour of the adverse possessor who is, of course, entitled to rectification as having acquired an indefeasible title." A footnote refers to the Limitation Act, 1939, s. 16. But it is not "of course." He may not have acquired an indefeasible title. Section 16 declares itself to be subject to section 7 of that Act and also to section 75 of the Land Registration Act, 1925. Section 75 in effect applies to registered land the law applicable to unregistered land save that the estate is not extinguished by expiry of the statutory period. Where the registered proprietor is a fiduciary owner, then even under the general law his estate would not be extinguished if there is an unbarred beneficiary, because section 7 says so. It follows that where the registered proprietor is a fiduciary owner, the question of rectification in favour of the adverse possesssor cannot arise until in accordance with section 7 all the beneficiaries have been barred. The passage in *Cheshire*, unqualified, may easily give the student an impression that the case of settled land and the case of registered land are mutually exclusive. A separate criticism may be made of the same passage: "settled land" is an ambiguous expression and it would be more accurate to express the exceptions as (1) settled land and land held on trust, (2) registered land.

These minor defects are merely so many irritant gnats which cannot obscure the bright beams emanating from the lucent orb that is *Cheshire*.

The outstanding difference between the primitive *Cheshire* and the two latest editions is that whereas the old work was moulded on section 1 of the Law of Property Act, 1925, the latest editions show that the author has liberated himself from the statutory fetters. He has mastered his materials and using his analytical skill has made massive rearrangements so as to present the law more simply, more comprehensibly and with greater truth. It is no disparagement to say that the work could still be much better than it is. When the reviewer was very green and had imperfectly learned the land law found in the eighteenth edition of Stephen's *Commentaries*, he resolved to study *Williams*. Mr. C. E. P. Davies advised him to give preference to *Cheshire*—then in its second edition. This is a single instance of something which must have happened thousands of times in the past thirty years. Wave after wave of students have gone forth to whom *Cheshire* was the first and last word on land law. The reviewer has heard of a repatriated Nigerian student attempting to quell the local court with a quotation from the Master. It is therefore in a spirit of piety and humility that the reviewer makes one or two suggestions for improvement.

In the Preface to the first edition the author explained that his design was "to space the text out and to add numerous headings and indentations,

so that the subject-matter may easily catch the eye of a reader." To space the text out is all very well. But the elaborate scaffolding with which the great work is cluttered up ought to be removed. It certainly catches the reader's eye and although it does not blind him it obscures his view. The student of land law must spend much time in reading sections in Acts of Parliament, Parts, titles and sub-titles, Schedules, etc., thereof. Ought he not to be spared excessive fragmentation in a textbook? *Cheshire* would be improved by being written without "summaries" or analyses before every Book, Part of a Book and Chapter, like any other Christian law book. The Table of Contents would sufficiently exhibit the articulation of the whole. As it stands there is a tabloid appearance out of keeping with the style and spirit of the work. The average reader of a popular newspaper could not read *Cheshire* with enjoyment, but it would not be astonishing if such a person, beguiled by huge headlines, "summaries" and interspersed pages containing a few words, should be tempted to turn its leaves over in the delusive hope of becoming his own land lawyer. A visible bony structure is an author's need in writing, not a student's need in studying the book. In this work it does not merely protrude through the flesh but is obtruded upon the student, as in a hall of mirrors, wherever he turns his fearful eye. Not wanting to regard *Cheshire* "in that bony light," the reviewer petitions that the offensive apparatus be removed. One more comment may be made on the question of mode of presentation. Book I (Introduction to the Modern Law) comprises one hundred and six pages. Is there any good reason why it should not be divided up into chapters as are Books II and III?

Notice must now be taken of a grievous omission. When in the seventh edition the author decided to include an account of the Rent Acts, he gave reasons in language unnecessarily apologetic (*ibid.*, p. vi) and observed: "It does not do to shut one's eyes to the realities of life." The dismissal of the system of conveyancing under the Land Registration Act in less than a page (see pp. 8, 100, 799) is almost to ignore completely one of the larger realities of life in the realm of land law. The reviewer is concerned on behalf of the student to whom primarily the author is speaking. The lecturer reading *Cheshire* unconsciously and tacitly makes glosses demanded by the system of registration of title. The student does not know enough to be able to do this and will accept as absolute statements which need to be qualified. For example, there is nothing to warn the student that where the land is in a title-registration area, failure to register the first conveyance on sale within two months will deprive the purchaser of the legal estate; or that as regards a subsequent transfer in a title-registration area, the legal estate is not acquired before registration of the transfer. Even if *Cheshire* disclaimed treatment of the "transfer" of rights in land law the criticism would not be wholly met for the system has effects on the substantive law. In fact, however, Book III is concerned with the "law in motion" (p. 619) and is entitled "The Acquisition, Transfer and Extinction of Estates and Interests." The student may know his *Cheshire* well as it stands and yet be ignorant not only of the basic principles but also of the essential vocabulary of the Land Registration Act. The system has absorbed so much new territory in recent years that ignorance of its elements should no longer be tolerated in a student of land law. Enough space could be saved to make possible (i) a historical sketch; (ii) a statement of the objects of the system; (iii) a statement of the effect of (a) first registration, (b) subsequent registration, with the various grades of title; (iv) a statement of the "incidents" of the registered estate; (v) a discussion of overriding interests; (vi) a discussion of minor interests; (vii) a description of the operation of an inhibition, a caution, a restriction and a notice. Again to apply the author's own language of understatement which he used of the Rent Acts (7th ed., p. vi): "It is doubtful, even, whether" the Land Registration Act "should be stigmatised as devoid of academic interest." The reviewer

would indeed claim that *Cheshire*, with all its excellences, must provide some such treatment if it is to survive. Let the work justify the designation "Modern" which is part of its title.

The reviewer hopes that land law, for centuries the flower of English legal science, attaining its most perfect and beautiful manifestation in the delicate art of the conveyancer, will long remain worthy of academic study and that it will not be torn down to enrich the dungheap of administrative discretions which are the negation of all law. But the tentacles of the administrator are long and insinuating:

> *. . . aequo pulsat pede pauperum tabernas*
> *regumque turris. . . .*

In the meantime so admirable a compendium of learning as *Cheshire* must strive after perfection of content and presentation. Disregarding former editions and trying to look at the work as freshly risen from the foam, the reviewer finds many charms and graces to extol. There is a pleasing gravity of style proper to the subject. Here and there the scholar's disdain for irrelevant detail: "So in the beginning of things the land . . . was owned and cultivated by village communities" (p. 491): "But at some period or other an overlord appeared . . ." (*ibid.*). These are the sort of utterances which bring Maitland to mind. Leisureliness, lucidity, and a sense of history characterise the work. To study *Cheshire* is like making a walking-tour of England, with an occasional visit to a local museum or record-repository. Past and present, rural and urban, domestic arrangement and commercial dealing, every aspect of our land law is treated and through it all mounts the sweet savour of the realty to solace and sustain the student during laborious days and toilsome sleep-denying nights.

F. W. Taylor.

An Englishman looks at the Torrens System. By Theodore B. F. Ruoff, Solicitor. [Australia: Law Book Co. of Australasia Pty. Ltd. ix and 103 and (index) 2 pp. 25s. net.]

This volume marks the centenary of the passing of the first Torrens Act of South Australia. It takes the form of a collection of essays on aspects of the Torrens System of Land Registration by one who serves in the Land Registry in London but has first-hand knowledge of the working of the system in Australia. The book is general rather than technical: How far should the register reflect title? What are the proper limits to the guarantee of title? How should a registrar operate the system? are the sort of questions dealt with. The book is then one from which others as well as conveyancers can profit. It is certainly one from which students can profit before they get enmeshed in detail. It admirably expounds the reasons for a system of registered land and explains some peculiarities of such systems. In doing so it urges reasonableness upon all registrars, and obliquely shows that England has been fortunate in its registrars, and in the way in which they have transmitted their reasonableness to their staffs.

On the working of a register the treatment by Mr. Ruoff of the insurance fund is particularly interesting. He gives facts about the English fund which are not readily found elsewhere. To him the fund is not an appendage of the system, but its essence—"It implies that the whole business of registration ought to be conducted with such an economy of public manpower, public time and public money, that the saving which is achieved far outweighs any payment of compensation for errors or omissions." Therein is summed up something of Mr. Ruoff's belief—that running a land registry is a business, a business which must be run efficiently and to the satisfaction of the

customers, the buyers and sellers of land. It is from that belief that springs Mr. Ruoff's concern with modern problems, freehold flats and the like.

The book is then one written by an enthusiast who communicates his enthusiasm in a convincing way. Something of the artistry of conveyancing may be lost under a system of registration, so too was something of the art of driving lost when there was a change from horse to motor, but with the likelihood of the steady growth of the system in England a book such as this which points to the real gains and how they may be lost or won is particularly welcome. It is to be hoped that there will be a steady demand for it from students, and if other editions are called for the editing might be stronger. There remain too many marks of an origin in articles—repetition of phrases of particular passages and the like, and it is a pity that such a small fault should mar a good book.

J. D. B. Mitchell.

Risk Aspects of the Irrevocable Credit. By Maurice Megrah, being the Gilbert Lectures on Banking for 1958. [London: Published for the Institute of Bankers. 1958. 57 pp. (No price given.)]

In this year's Gilbart Lectures Mr. Megrah has returned to the subject of the banker's documentary credit on which he has given two previous courses of these lectures: as the editor of Gutteridge's *Law of Bankers' Commercial Credits*, which is the most authoritative textbook on the subject he must be regarded as one of our leading specialists. On this occasion he discusses again some of the material which he used in the earlier courses but particularly from the angle of the risk which the banker runs in granting these credits. These arise of course particularly from the fact that in the normal case he has to accept on behalf of his customer the tender of the documents of title against the delivery of which he makes the credit available.

These risks arise both from the character of the documents themselves, which are quasi-negotiable, and also from the stipulations as to their contents which are contained in the credit granting documents; for these are often unskilfully drafted. It is not surprising that questions arise from time to time as to whether the documents tendered are in order: questions which have to be answered without delay. The usual method of overcoming these difficulties, when they are not just brushed aside, as often happens, is for the banker to insist on a letter of indemnity from the party presenting the documents, or his banker. This system of indemnities which is obviously of great commercial importance has but seldom been inquired into by the courts, so that its legal aspects are somewhat uncertain and fluid.

Mr. Megrah sails about in these largely uncharted seas with the assurance of one who is familiar with every tide and current. Much of what he has to say cannot be found anywhere else, even in his own edition of Gutteridge, and there are very few lawyers who have the practical knowledge of banking which gives so much weight to his commentary. It is very much to be hoped that in the next edition of Gutteridge he will make more extensive use of the material which he has collected in his three courses of Gilbart lectures, so that the profession may have it in a more permanent and handy form.

At the same time I should like to express the hope that he will be able to devote attention to recasting a good deal of it. Large parts of these lectures give the impression of having been put together somewhat hastily and not revised before publication. Thus there are sections which seem to be out of logical order, thrown in, as it were, by afterthought. Much of the phrasing is involved and obscure and must have been extremely difficult to follow for the type of student who attends the Gilbart Lectures. Indeed

one wonders whether so difficult a topic is not beyond the capacity of most of them in any case and one consoles oneself with the thought that it was probably only through the Gilbart course that this valuable material could have become available. And surely Mr. Megrah is taking too much for granted when he assumes that his audiences "will recall the *Caspiana* case" and will have in mind his observations on "stale bills of lading" in the earlier course of lectures. Indeed quite apart from the calibre of his audience Mr. Megrah has not really been fair to himself in leaving so many obscure and even inaccurate passages uncorrected. Illustrations of what I mean can be found in his observation about the *Caspiana* case (p. 14), at p. 20 where "accepting" should be "excepting"; and again at p. 38 where "unclean" should be "clean": mistakes no doubt obvious enough to the informed reader but likely to provide pitfalls for the young bank officer who is a likely student of Gilbart Lectures.

Not only does Mr. Megrah make available much otherwise inaccessible material, but he provides a commentary which is at once shrewd and to the point. He does not allow himself to be overawed by the authority of judicial pronouncements and his dissents are powerfully argued, often carrying conviction. Certainly practitioners whose work requires them to advise upon commercial credits would be well advised to secure all three series of lectures, and eventually perhaps a fourth; because there are still a number of points to which Mr. Megrah might well turn his attention before he vacates the Gilbart lectureship.

C.

The Law of Copyright. By Copinger & Skone James. Ninth Edition. [London: Sweet & Maxwell, Ltd. 1958. xxxvi and 917 pp. £5 10s. net.]

Following on the presentation in October 1952 by the President of the Board of Trade of the Report of the Copyright Committee 1951, Parliament found occasion to reconsider and overhaul the entire English law of copyright. Its labours bore fruit in the Copyright Act, 1956, which, with its attendant Orders and Regulations, came into force on June 1, 1957. One of the consequences of the considerable changes so effected was to render the eighth edition of Copinger (then less than nine years old) virtually obsolete.

Mr. F. E. Skone James, who first took over the editorship of Copinger in 1927, and who had the advantage, in addition to all his other qualifications, of having been a member of the Copyright Committee, has written what is in effect a new book. Had he claimed the authorship entirely for himself (and for his son, Mr. E. P. Skone James, who collaborated with him), he might well have been within his rights. But *Copinger on Copyright* having held this particular field for some nine-tenths of a century, the name was not one to be discarded.

The scheme of the work follows the traditional pattern. About half of the book consists of text, and most of the rest contains a positive reference library of precedents, statutes and orders, English, Commonwealth and American, comprehensive enough to serve all the ordinary requirements of the practitioner. The usual tables of statutes and cases at the beginning, and sixty pages of index at the end, account for the remainder of the volume.

Amongst the many special features of this new edition which are worthy of note are the chapters dealing respectively with originality, income tax, broadcasts, the Performing Right Tribunal and the transitional provisions involved in the survival of rights acquired under the law as it previously stood.

Practitioners will also derive much help from the method adopted by the learned editor in expounding the changes in the law. Mr. Skone James

has not contented himself with merely pointing out how the law now stands, nor yet with calling attention to the points at which the old law has been changed. Repeatedly, he has foreseen the difficulties likely to arise in applying the new law to possible situations; and whenever this has occurred, he has offered tentative solutions for the guidance of those who might feel perplexed in advising a client. Whether or not the courts eventually adopt his view, the unwary will at least have been warned of the pitfalls, and one side or the other will have been armed with a formidable argument.

It is not surprising that so carefully edited a work should contain only minor (and almost all typographical) errors. There is, however, one slip which will doubtless be corrected in the next edition. Amongst the many changes in the law of copyright which have been so relentlessly followed to their logical conclusion, an incidental reference (at p. 375) to a repealed provision of the Statute of Frauds has evidently escaped notice. For no mention has been made of the Law Reform (Enforcement of Contracts) Act, 1954, by which it was amended. But criticism which is driven back on such *minutiae* is in itself a form of back-handed commendation. There can be no doubt that with this edition Copinger (now to be appropriately known as *Copinger and Skone James*) still holds the field of copyright against all comers.

Walter Raeburn.

Sexual Offences. A Report of the Cambridge Department of Criminal Science. With Preface by Dr. L. Radzinowicz. [London: Macmillan & Co., Ltd. xxvii and 553 pp., including Appendices. 63s. net.]

In 1950 the Cambridge Department of Criminal Science commenced a detailed study of sexual offences committed in fourteen different districts of England and Wales. These were carefully chosen to represent both agricultural and industrial communities, but with a special emphasis on the great urban areas, especially London. Three thousand cases were investigated, covering a wide range of heterosexual and homosexual behaviour. Appendix 4 explains how the inquiry was conducted, and what records were perused. The report of the results of this survey is prefaced by a commentary and summary by the Director of the Department, Dr. Radzinowicz, together with a chapter on the general trends in sexual crime, based on the official statistics. Appendix 1 contains a valuable note on the shortcomings of such statistics. The volume concludes with a first-rate account of the law and practice relating to the trial of sexual offences, including the rules of evidence, and suggestions with regard to the amendment of the law. There are also several chapters outlining the position with regard to sexual offences in the Scandinavian countries, and in Belgium and the United States, written by leading criminologists in those countries.

Although, as Dr. Radzinowicz freely admits, the section dealing with the analysis of the three thousand cases from every conceivable angle "may seem arid" (xviii), some exceedingly valuable points emerge. For example, the reluctance of the courts to call for a medical report, while it may be forgiven where the offender will clearly have to be sent to prison in any case (p. 184), is not so easy to understand where repeated short sentences have been imposed (p. 187) or where the courts alternate almost at random between imprisonment, fine and probation. The suggestion that imprisonment might be followed by a period of probation is an interesting one, which would require legislation, and although this much is admitted there is no discussion of how this might fit in with the existing after-care provisions. The finding that in general sexual offenders do not have such a tendency to recidivism as is popularly supposed, and that the violent ones rarely repeat violence is extremely significant. It is also observed that when such offenders do

repeatedly come before the courts, their record is often a rather mixed one, including offences against property as well as offences against the person. All this helps us to see the sexual offender in a more sober light, and dispels much of the popular myth of the sex fiend. The effectiveness of fines and probation as methods of dealing with sex offenders is amply demonstrated, though the short term of imprisonment cannot it seems be completely ruled out as a suitable method of dealing with some offenders. Too indiscriminate use of any of these methods militates against success and is a danger to be guarded against, but quite how the courts are to guard against it is not made clear.

It will be obvious from what has been said that this study provides some exceedingly useful information. However, there is a great deal of information which it does not provide, but which a study of the report suggests might be valuable. Whether the method by which this study has been carried out prevented these matters being further investigated is a matter for consideration. There is a limit to the usefulness of the information which can be obtained by this method. To embark on a general inquiry without formulating any particular hypotheses for testing by modern statistical techniques, to range far and wide in calculating percentages of this and that, taking every conceivable arrangement of the facts and squeezing the last ounce of information out of the material assembled, until one can almost hear the pips squeak as they cry out for mercy—this may uncover some useful facts, as this report undoubtedly reveals. But it may also lead to some rather barren conclusions, and this cannot enhance the reputation of criminology, which is already in danger of becoming a sterile science. To illustrate what this reviewer has in mind, reference may be made to the statement that only three per cent. of convicted sexual offenders appeal—but we are not told what percentage of all offenders appeal. The fact discovered is served up naked instead of being clothed in the knowledge that the overall percentage of convicted persons who appeal is ? per cent. It is revealed that the reconviction rate is higher among those with criminal records and that among those who have been sent to prison the likelihood of recidivism is greater. But surely this is only to be expected. It is not improbable that recidivists recidivate (if one dare use a verb which has already obtained some currency), and it is also a fair bet that the offenders with the worst records will predominate among those who are sent to prison, and that therefore among prisoners there will be a higher reconviction rate than among non-prisoners. Discoveries of this nature do not reveal anything. What we would really like to know is whether the chance of recidivism is likely to be increased by sending a prisoner to prison rather than fining him or putting him on probation. This kind of information can be supplied by the use of modern statistical techniques and methods of inquiry. Such methods have not been employed in this study. One would have thought that the time was long since passed when it was sufficient in criminological research to embark upon a general investigation of this nature, which must involve prodigious effort hardly commensurate with the results achieved.

The excellence of the chapters on the state of the law in this country and the rules of evidence in relation to sexual offences, together with the very reasonable proposals for reform, go a long way to redeem the home-produced section of the book. The addition of brief chapters on the law and practice relating to sexual offenders in Norway, Sweden, Denmark, Belgium and the United States, all written by expert contributors from those countries, adds immensely to the value of the volume. Here is spelled out for us a timely warning against the introduction of special laws for dealing with sexual offenders, whether as sex psychopaths or as recidivists. While there is room for much more psychiatric investigation within the prisons, and a special psychiatric prison hospital is now being built in this country, it would appear from these chapters that there is no case for a special institution for sexual offenders or a special law for dealing with them, and it should

be realised when such proposals are being considered that no completely satisfactory therapeutic solution has yet been developed for the treatment of sex offenders. For making this clear we must be truly grateful.

J. E. Hall Williams.

The Urge to Punish. By Henry Weihofen. [London: Victor Gollancz, Ltd. 1957. x and 213 pp. and (index). 15s. net.]

Dr. Isaac Ray, whose work is almost unknown in England, was one of the greatest and most profound students of the medical jurisprudence of insanity so far produced by the Anglo-Saxon world. He practised as a physician in Maine and Rhode Island and published his remarkable book on the *Medical Jurisprudence of Insanity* as long ago as 1838, and his *Project of a Law for Regulating the Legal Relations of the Insane* in 1850.

During this period of twelve years the debate over the McNaghten Rules was almost as hot in the U.S.A. as in England. They were adopted in most State jurisdictions against the well-argued protests of Dr. Ray who contended that insane persons should not be held responsible for criminal acts unless such acts could be proved by the prosecution not to have been the result, directly or indirectly, of their insanity. He did, however, have one outstanding success, for he persuaded Judge Doe of the New Hampshire Supreme Court to accept his view. The judge was a man of exceptional ability and force of character: he was included by Roscoe Pound among "the ten judges who must be ranked first in American judicial history." The correspondence between the judge and the medical man has been recently published, and is said to be of great interest.

Judge Doe, starting in a minority of one in his court, succeeded in converting his brethren to accept the Ray view of the matter, so that from 1869 the New Hampshire Courts abandoned the McNaghten Rules and applied the Ray Rule. That was the limit of Ray's success; for no other State was prepared to follow New Hampshire though the District of Columbia has since done so.

However, in 1952 the American Psychiatric Association decided to commemorate Dr. Ray by founding an annual lecture course in the Isaac Ray Award and it is to this foundation that we owe the present volume which is composed of the six lectures given in 1955 at Temple University, Philadelphia by Professor Weihofen of the University of New Mexico, himself the author of *Mental Disorder as a Criminal Defence.*

The lectures are devoted to establishing the superior excellence of the Ray Rule over the McNaghten Rules which are most ably criticised. The subsequent history of the Rules is indicated and the difficulties encountered in the various State jurisdictions while attempting to apply them are examined. The longest and perhaps the most useful of these lectures is the discussion of the report and recommendations of our own Gowers Commission: this is contained in a chapter entitled "Two Roads from McNaghten." This contains much acute criticism of the Royal Commission's recommendations made from a progressive point of view—it is a pity the book was not available here at the time when the Report was under discussion.

Professor Weihofen also subjects the interesting proposals in respect of insanity as a defence which have been put forward in the American Law Institute's Model Penal Code to a close and indeed somewhat damaging scrutiny.

In his final and most illuminating chapter, from the title of which he takes the title of the whole work, Professor Weihofen explores the underlying psychological forces which give the urge to punish its strength and ruthlessness. He shows how most of the trouble which arises from insanity as a defence in criminal cases stems from the death penalty, the maintenance of

which again is largely due to deep subconscious feeling. He seeks the solution in the abolition of capital punishment for which in his final pages he makes an eloquent and convincing case.

C.

British Criminal Justice. By Sir Maurice Amos. 50 pp.

The English Bar and Supreme Court Civil Litigation. By Arthur Hereward Ormerod. 46 pp. [London: Both published for the British Council by Longmans Green & Co. 1957. 2s. 6d. net.]

It is understandable that the British Council, one of the main objects of which is to make the British way and purpose known to the world, should wish to have available for its customers a series of short guides to our legal system. Much more care, however, should have been taken in the planning than is evident in these two booklets. The first of these was the last work of Sir Maurice Amos whose ability to present a big subject attractively and lucidly in small compass had been well shown in his little primer on the British Constitution. The present essay originally published under the title of British Justice was written at a time when it was desirable to present to the world our conception of fair play and equality before the law, which is nowhere better exemplified than in a criminal trial. It was no doubt for this reason that the author concentrated on the criminal side of our administration of justice. He presents it as one would expect in an attractive, sympathetic manner, but the picture is nevertheless unsatisfactory, because not altogether in perspective, and because the painting is very uneven. Thus the office of the Director of Public Prosecutions is given as much space as is the description of a criminal trial, that is, five pages. The police get more space than either, while the Rules of Evidence receive only one page, unless one adds in the two pages devoted to the Judges' Rules which are, however, discussed quite separately, and which one would hardly realise had any particular connection with Evidence. About one-fifth of the book is taken up with an account of the trial of Norman Thorne for murder. This case was fairly typical of its kind, and might have been effectively used for illustration of several of the points made in the preceding text. The reader is, however, left to do that work for himself which is, no doubt, morally very good for him, but one may doubt whether such exercise will appeal to the foreign reader, especially if his English is weak.

The other volume is intended as a companion to the first. From the point of view of a description of the administration of the law in England it is even less satisfactory. Apparently an earlier version was withdrawn for rewriting—it had at any rate the more comprehensive if equally inaccurate title, English Civil Law. The Bar is certainly a typical and important factor in our legal administration, but it is only one factor and is perhaps less important than the solicitors' branch of the profession, and certainly both less important and less interesting than our judicial system. The title is not only misleading in this respect, but also in the statement, implicit in it, that the Bar is occupied only with civil litigation and then solely in the Supreme Court.

Of course, in the text something is done to repair the erroneous impression given by the title but the text itself contains many inaccuracies and misleading statements. Thus at the beginning we are told that "solicitors were previously known as attornies"—actually as much as two pages is taken up with the development of the profession of attorney in the Middle Ages, but nothing whatever is said about that of the solicitor. Again it is stated that Queen's Counsel are confined to appearing at the trial of actions, whereas in fact

not only do they advise in many important cases, but for some of them arbitrations, whether they appear as advocate or as arbitrators, provide a substantial part of their work.

It would be possible to give other examples of misleading statements, but inaccuracy is not the worst feature of this booklet. Owing to the rather lengthy and ill-balanced account of the barrister's profession which takes up the first third of the book, a good deal of procedural information is interposed at a point before the reader has been instructed as to the procedure in an action: the result must be extraordinarily confusing to the uninitiated. Again, as is so often the case with introductions to the English legal system there is an undue concentration on the historical aspects. Thus when, about halfway through the volume, we finally reach the English court system we have to be told all about the *Curia Regis* and the three common law courts, and the rise of the Court of Chancery. As is so often the case the description of what is now actually done in the three divisions of the High Court receives only a fraction of the space devoted to the court system in the Middle Ages. The English certainly do love history, but one wonders whether foreigners are quite so keen, at any rate on English history.

The basically important contribution of the judiciary to the English legal system has already been mentioned. This nowhere appears from the present work. There is half a page on numbers, hierarchy, qualification and method of appointment, which contains the thoroughly misleading statement to a foreigner that judges are appointed by the Queen, and a few lines on the summing up, but no sort of attempt is made to assess the work of the judge throughout the trial which, in my experience, makes a powerful impact on the average foreign observer.

This part of the booklet does, however, contain a clear step-by-step description of a civil trial which would enable anyone making use of it to follow what was going on adequately. Its weakness is that having decided upon a road accident case for his illustration the author omits to refer to such important interlocutory proceedings as the discovery of documents, interrogation, *et al.*

There is a short description of the county court system which hardly brings out its basic importance in the administration of English Civil Justice. The author singles out as the main distinction from High Court procedure the fact that the dates for trial are fixed. The arrangements for the provision of similar facilities in the High Court must have been complete before the work was published, and it seems inexcusable that this important innovation should not have been referred to in an addendum slip.

Perhaps the most attractive feature of both booklets is a series of photographs of scenes in and out of court which may help a foreigner to get some idea of what goes on. On the whole, however, one cannot escape the conclusion that this incursion into the realms of legal administration is not one of the British Council's most successful efforts.

C.

Cockle's Cases and Statutes on Evidence. By G. D. Nokes, ll.d. Ninth Edition. [London: Sweet & Maxwell, Ltd. 1957. xxxi and 512 pp. £2 2s.]

"Our system of evidence . . .", the late Sir Roland Burrows wrote in his Introduction to the 5th edition of *Cockle's Cases* which appeared in 1932, "in essence is not logical but practical." Actually, what troubles the thoughtful student of the subject, and the practitioner, is not so much the fact that it is sometimes downright illogical, but the recognition that it is often impractical as well. It is certainly exceedingly complex and that alone

makes one grateful to Professor Nokes for having subjected *Cockle* to a detailed revision and for the attempt to "modernise" his new edition.

That, quite apart from bringing the cases and statutes up to date, he has pruned the work of the high proportion of very old cases with which it was littered is by no means the full measure of his most valuable effort of revision. The very title-page indicates a distinct change of emphasis, for the words "With notes explanatory and connective, representing a systematic view of the whole subject" have now disappeared from it and with them the major part of the introductory notes to the various sections. A case-book is after all not a treatise and the attempt to marry the two is likely to produce a mongrel: the expository passages take away space urgently required for quotations from the actual cases, and the paramount need for adequate extracts from the decided cases leaves enough space only for over-simplified exposition of little real value. Even the explanatory notes at the end of the cases have been cut down in the ninth edition to a bare minimum, and the objectionable practice of drawing particular attention to certain words or sentences by picking them out in heavy type has been abandoned, with the result that space has been gained for the cases and the equally important extracts from Statutes and statutory rules which are the real object and justification of a work like *Cockle*.

Indeed, the space so gained has enabled the new editor to be more catholic in the selection of cases and statutes to be included than would otherwise have been possible without considerably increasing the bulk of the book. In the end, although it is never difficult to discover in a book of this sort cases which, in one's personal view, should have been included and are not, and others which might have been omitted without any great loss, the only serious objection which might conceivably be raised against the most valuable ninth edition is that here and there the editor's revision has still not gone far enough. Professor Nokes explains that there has been little alteration in the main plan of the work, on the ground that "it did not seem justifiable to substitute my personal preference for a plan which was already familiar to many readers." But this adherence to the original arrangement and sequence of the various sections of *Cockle* leads to some odd results. Thus, for instance, the chapter-heading "Matters of which Proof is Allowed" made sense so long as it was thought, as earlier editors obviously did, that there are definite "rules of legal relevancy" and even that some sort of catalogue of such matters could be drawn up (as we find in the Index of earlier editions); it reads incongruously now that Professor Nokes has brought *Cockle* round to the view that "in general relevant facts are admissible; but they may also be inadmissible if they fall within some rule of exclusion such as estoppel or privilege. . . ." What is more, the arrangement of *Cockle* corresponds neither with *Phipson* nor with the editor's own textbook and that seems hard luck on the students for whom the case-book is primarily intended.

The editor has, rather surprisingly, retained from the earlier editions, almost unaltered, the rough and ready definitions of "terms descriptive of different varieties of evidence" at the beginning of the book. The expression "real evidence," for instance, is usually taken to include a view on the spot, but the verb "produced" employed here seems (intentionally?) to exclude this from the definition. "Documentary evidence" as defined in this section does not, on the other hand, distinguish between the use of documents in court as evidence of their contents, which is the normal meaning of "documentary evidence," and documents used as evidence of some extrinsic fact like, say, forgery, in which case they fall, it would seem, more properly into the category of real evidence.

To point out these slight blemishes in the ninth edition of *Cockle* is only to encourage the new editor to carry his admirable work of revision still a little further.

H. A. Hammelmann.

Theory and Reality in Public International Law. By Charles De Visscher. Translated from the French by P. E. Corbett. [Princeton: University Press. London: Oxford University Press. 1957. xvi and 381 pp. 30s. net.]

Professor De Visscher's *Théories et Réalités en Droit International Public* has now been made available to a wider circle of readers by Professor Corbett's translation. The great wealth of experience gained by the author as counsel, negotiator, arbitrator and judge in international affairs makes this one of those few works which are not merely interesting and useful but can seriously be termed significant.

The central problem treated is to decide on what level of generalisation or individualisation actual cases should be approached. Although international law is a normative science it is frequently difficult to make an exact adaption of norms to the great variety of situations that occur. So the author states, "When the circumstances of the concrete case include elements which prima facie connect them with typical situations already ordered by law, the judge will endeavour by some process of abstraction to find a solution along the lines of generalisation by classification. When, on the contrary, the case, looked at in its reality, evades any such effort because its elements are sharply particularised or individualised either by their material incidents or by the will of the States concerned, he must respect its particular configuration without yielding to the charm of generalising abstraction or to teleological considerations, and without being led astray by objections based on the anomaly of the case or the relative inefficacy of the regulation to which he brings his sanction" (p. 353). It is at this stage that the political element makes itself most felt. Law, because it is a normative science, is most useful when it lays down general regulations. Political settlements are aimed at particular situations as they occur.

In the past law has been most successful on the administrative plane. The so-called vital issues have been withheld from judicial settlement. Unfortunately if law is to impress itself on these vital issues it must coincide with a revision in our attitude toward the State and particularly the "power elements" in international relations. This becomes increasingly difficult as States increase their power and the scope of their activity in the "domestic sphere." This impasse is caused by the heritage of the nineteenth century positive approach to international law. Pure law for the Positivist school was that law which was characterised by the "acceptiveness" of States members of the international community. So it is that the political element became a decisive criterion of the validity of legal norms. As Professor De Visscher points out, "This attitude paralysed the critical spirit and too often froze the law in positions ill adapted to the profound changes demanded by the times" (p. xi). Since law like politics and economics is an element in international society it must learn to adapt itself to changing conditions. Further it must recognise and reconcile realities.

The first part of this work reviews the international relations against the background of the political situation within which they are conducted. It is followed by an analysis of the general relations of power and law. The bulk of the work is given over to the analysis of rules and practices and the principal institutions which are material for the international lawyer. Finally the author reviews the process of judicial settlement and the part played by politics in the settlement of legal disputes. It is in this last book that the author's experience is brought to bear. It should prove an invaluable analysis to any reader however knowledgeable or experienced he may be. Our only regret is that the author does not devote himself to the problem of the enforcement of judicial decisions. In fact the application of sanctions in international law is barely touched on. Since the author is a man so obviously well-equipped to discuss this subject one can only regret that he did not

include a separate chapter on sanctions. It is a subject profoundly affected by the relations of law and politics, and certainly the most significant in present day international affairs and one which international lawyers must face.

The most significant part of the work is the early discussion of the relation of law and politics against the background of international society. It contains an excellent discussion of doctrines past and present and the lesson is drawn that everywhere the facts have been a stronger pressure than theories. The great reality at present is the predominance of national individualisms, the psychological factors that group men around the State and the tensions to which these give rise.

There are two standards by which we can critically examine the rules of positive international law: "the degree to which its content corresponds to social needs, and the accuracy of its formal expression compared with the practice of states" (p. 133). Professor De Visscher then goes on to say "A normative (law-making) treaty the content of which is too far in advance of development in international relations is stillborn, just as a treaty that ceases to be exactly observed in the practice of governments is no longer valid in its formal expression" (p. 133). There is something of a *non sequitur* here. It is characteristic of the more revolutionary writers in American jurisprudence to equate law with the objects it achieves in actual practice, but are we to say that a normative rule which is in advance of present State practice can be disregarded by States which have previously signified their acceptance of it? If a rule has found adequate expression in the formal process appropriate to international law then it must exist as a valid criterion by which to judge the action of States, otherwise we have no legal standards by which to criticise the practice of the international community and more especially its individual members. We recognise the authority of these general rules, and we should also keep in mind the fact that concepts used in particular law are borrowed from general law.

Realism, if pushed to excess, denies the content of any legal rule, . . . which claims validity because of its formal expression, and finds the source of law in the realities of State practice. But as Professor De Visscher himself recognises, "if abstraction carried to an extreme degree degenerates into unreality, individualisation pushed to excess leads to the destruction of the rule" (p. 138). It is the task of the international lawyer to bear in mind the general principles governing international conduct and the relevant practice of States, so that international law may develop to the point where the general principles themselves adequately reflect the realities of State practice, but in doing this we should not be prepared to sacrifice our legal values to accommodate the political realities of power. International law has a complementary task of education, so that State practice may adopt those general principles which the work of generations of international lawyers has produced.

This work should do much to help bring together the work of jurists and sociologists in the realm of international affairs. Its main lesson for the jurist is that a closer appreciation of the data produced by the science of international relations is vitally important and should be substituted for the tendency to exaggerate the autonomy of his discipline. The sociologist must learn to appreciate the normative ends of law and the measure of formalism which is necessitated by these ends. So we may hope to close the gap between precept and practice and look forward to an era in which law can play a vital part in the changing realities of the international community.

This is not an elementary work and many students may find it difficult, but it is strongly recommended to anyone who has something more than a passing interest in any aspect of international affairs. Furthermore as a contribution to the theory of law it should prove not merely a stimulating but a profound work.

J. A. Andrews.

A United Nations Peace Force. By William R. Frye. [London: Stevens & Sons, Ltd. 1957. xii and 227 pp. 30s. net.]

This book deals with the possibility of establishing a United Nations peace force and covers the subject from all angles. Every problem likely to arise is investigated by Mr. Frye and a team of experts who have contributed a very large appendix (105 pp.) to the work.

Mr. Frye is UN correspondent of *The Christian Science Monitor*. He is a man who appreciates the difficulties of putting ideas into practice. He also has a brisk and clear style which makes his work a very readable one. Unfortunately his style occasionally runs away with him and passages in the work tend to read like newspaper copy. So, for example, we are told that Mr. Lester Pearson was able to convince Mr. Hammarskjold of the value of a UN Emergency Force during the Suez crisis over lunch and "Early in the fish course Pearson was able to convince him that the obstacles could be overcome" (p. 5). Later in describing how hectic were the first eight days of UNEF we are told how Hammarskjold, Bunche and Cordeir found "an all-night hamburger joint on Lexington Avenue" (p. 26) where they went for "pre-dawn snacks." One of the weaknesses of the early arrangements for the force was the feeling of frustration experienced by the men whose duties were routine and who were stationed far from normal entertainment in 100-degree heat and "it was summer 1957 before the first sultry redhead, Abbe Lane (Mrs. Xavier Cugat), set out" explains Mr. Frye (p. 86).

A style as brisk as Mr. Frye's is apt to become racy and no attempt is made to curb it. This is a great pity since it tends to detract from the very real scholarship which Mr. Frye has put into this work.

The one advantage of his journalistic experience is, however, that he is not afraid to come to grips with the substantive issues involved. One is left amazed at the number of problems which arise when the ideas of men are investigated in cold reality. The author does not shirk his task, nor does he allow himself to lose faith in a project involving so many difficulties. He is not afraid to offer suggestions and to speak his own mind. He boldly states that the Anglo-French-Israeli show of force in 1956 was "in violation of the Charter" and "a desperate act" (p. 2).

He faces the difficulties of diplomacy within the UN. He is unfortunately prejudiced in the circumstances in which the force is to operate even, seemingly, at one stage contemplating a force over which the United States shall have full control (p. 73). Throughout, the force is visualised as one dominated by Western ideas, even though he concludes that it will probably be better to have a force drawn from the smaller nations, financed largely by American dollars. While American finance will obviously be an essential to a UN force it is a pity that Mr. Frye should visualise an American controlled force, even if we assume that American diplomacy is best for the world.

Having taken account of the various difficulties, political, strategic and military, Mr. Frye and his other contributors make various suggestions as to the form the proposed force might take. He very properly suggests the most feasible force would be a small one, about 8,000 men, which would patrol troubled areas and act as a sort of "plate-glass window" between rival forces. It would rely more on the prestige of the UN and the resulting force of world opinion which would fall on any government or rebel forces which were to attack it. At the same time governments might earmark troops to be kept in reserve. The great argument in Mr. Frye's favour is one of logic. As he so properly points out "The idea of an international police force is so logical, on the face of it, that it is a major mystery why—in all of human history—there have been so few serious attempts to establish such a force" (p. 46).

The work is a stimulating and an interesting one. It touches on the one fundamental problem of our time—how to obtain a measure of control over the currents of international tension. It is written for all those people, diplomats, strategists, lawyers and a host of ordinary people who are and should be interested in a solution of this problem. In a book directed towards such a universal audience it is quite understandable that the lawyer, diplomat and soldier each may find statements which he does not agree with, it would be most surprising if he did not, but no one will find this work dull reading.

J. A. Andrews.

The Legal Framework of World Trade. By V. A. Seyid Muhammad. [London: Stevens & Sons, Ltd. 1957. xiii and 348 pp. £2 2s. net.]

The title of this book is promising, but misleading, for in substance the work deals merely with the General Agreement on Tariffs and Trade (GATT) which was negotiated in 1947 at Geneva and is at present binding upon thirty-five States. It is an important subject and there is no reason for suppressing it in the title, though possibly the author slightly exaggerates when he speaks "of the key position which it occupies in the control and movement of world trade" (p. xi).

The book includes twelve chapters in the course of which Dr. Seyid Muhammad reviews the organisation, the practice and the functions of GATT in considerable detail. The author tells us that he has attempted "to apply the inductive method to the study of the legal aspects of the theory and practice of the General Agreement" (p. 1). But this is hardly meant to explain or justify the largely descriptive character of the work, the infrequency of close legal reasoning and formulation or the failure to throw to any substantial extent new light on matters of legal analysis, such as the nature of discrimination or the ambit of the principle of non-discrimination or, to take at random another example, on the *United Kingdom Utility Furniture* case. This incident is mentioned on p. 168, while the facts are given on p. 220. It arose under Art. III which is headed "national treatment on internal taxation and regulation," but the text of which cannot readily be found in the book, there being no Index referring to the Articles of GATT nor an appendix containing their text. It was eventually disposed of by the United Kingdom's acceptance of the Dutch thesis, but it would be interesting to know (and is not stated in the book) what the precise point of the dispute and the parties' arguments was and how it illustrates the construction of or the principle underlying Article III.

The real value of the book, then, lies in its discussion of the various functions of GATT, of the historical background of the organisation and its connection with other institutions, both past and present, and of its place in the world of economics. The author has done well to make ample use not only of the non-legal literature on the subject, but also of the *travaux préparatoires* and the numerous documents and records issued by GATT itself. He has made a helpful contribution to a difficult and somewhat inaccessible subject and is, therefore, entitled to indulgence if he does not fulfil every reader's expectations. All readers, however, are likely to share the hope that the author will continue to work in the field he has chosen. It is badly in need of investigation by authors such as Dr. Seyid Muhammad who approaches it with enthusiasm and a keen mind.

F. A. Mann

Laws and Regulations on the Régime of the Territorial Sea. United Nations Legislative Series. [New York: United Nations. London: H.M.S.O. 1957. li and 811 pp. 50s. net.]

The failure of the Geneva Conference on the Law of the Sea, followed by announcements by both Iceland and the Faroes of their intention to extend their territorial sea to twelve miles, made clear the complete disagreement that exists among maritime States as to the requirements of international law where territorial limits are concerned. In his *Inter-american Law of Fisheries* (reviewed at p. 710, *post*) Professor Bayitch points out that the three mile zone is traditionally accepted, and that established rules of international law cannot be unilaterally abrogated at the will of individual States. Nevertheless, in his *International Law for Seagoing Officers* Commander Brittin found it advantageous to append a list indicating the "Breadth of Territorial Sea and Contiguous Zones claimed by Nations of the World" varying in breadth from three to two hundred miles, with the United States claiming three and Louisiana twenty-seven miles, while Eire was satisfied with limits "in accordance with international law," whatever that may mean.

From the point of view of seagoing personnel, particularly those on fishing vessels, it is essential to know with some measure of certainty the extent of the territorial sea claimed by the various States in the area where they happen to be operating. This knowledge is now readily available in the new volume of *Laws and Regulations on the Régime of the Territorial Sea* published by the United Nations, although what Eire means by its reference to international law does not appear, for there is no entry on the Republic of Ireland. Nor, since the volume was compiled in November, 1956, does it assist in ascertaining the authority for Professor Bayitch's assertion that "late in 1956 the Canadian Government indicated its intention to extend territorial waters to twelve miles."

This volume consists of the national legislation of some fifty-odd States and their dependencies on the juridical status, breadth and delimitation of the territorial sea; the legal régime concerning ships in the territorial sea; fishing in the territorial sea and the application of neutrality laws in the same area. In addition there are more than 100 pages of bilateral and multipartite treaties dealing with the same matters, but not the Anglo-Danish agreement of 1955 concerning the three-mile zone round the Faroes. The Secretariat of the United Nations has, with its various collections of laws, already put international and comparative lawyers deeply in its debt. With this new volume the debt has become even heavier and persons interested in the law of the sea now have at their disposal United Nations collections of Laws and Regulations concerning the Régime of the High Seas, Laws concerning the Nationality of Ships, and Laws and Regulations on the Régime of the High Seas.

L. C. Green.

Yearbook of the International Law Commission. 1949, 1950, 1951. [New York: United Nations. London: H.M.S.O. 1949, vi and 312 pp. 22s. 6d. net; 1950, Vol. 1, ix and 342 pp. 25s. net; Vol. 2, iii and 387 pp. 28s. net; 1951, Vol. II, iii and 146 pp. 11s. net.]

In an earlier number of this journal ((1958) 21 M.L.R. 338) the reviewer welcomed the new departure made by the United Nations in publishing the records of the International Law Commission in a more permanent form than the cyclostyling used previously. He finished his note by expressing the hope that the finance department of the United Nations might be persuaded of the value in publishing at least the reports of

Special Rapporteurs submitted to the Commission, even if they would not agree to publish all the reports in the new format. It is with great pleasure, therefore, that a welcome is extended to the volumes for 1949, 1950 and the volume of documents for 1951.

Among the debates that may be read in these volumes are those on the choice of subjects to be studies by the Commission, a far more fascinating subject than one might assume; the draft Declaration on Rights and Duties of States; the Principles recognised in the Nuremberg Charter and Judgment, consequent upon the resolution of the General Assembly affirming these principles; the problem of international criminal jurisdiction; the early discussions on the law of treaties, the régime of the high seas, and arbitral procedure. The documents printed in the documentary volumes for 1950 and 1951 include the first two reports on the régime of the seas prepared by Professor François, together with governmental replies to the first report; two reports by Professor Scelle on arbitral procedure and another two by Brierly on the draft convention on the law of treaties. In addition, there are various documents on different aspects of international criminal law: the Nuremberg principles, the draft code of Offences against the Peace and Security of Mankind, and the Definition of Aggression.

While one must be grateful for what the Secretariat has seen fit to make available, it is unfortunate that not all the interesting documents prepared in connection with the Commission's work have been printed. Thus the fascinating memoranda prepared by the Secretariat on Soviet Doctrine and Practice with respect to Arbitral Procedure, the Law of Treaties and the Régime of the High Seas, as well as the bibliographies on the High Seas, on International Criminal Law and an International Criminal Court, as well as on arbitral procedure are still only available in mimeographed form. It is to be hoped that the Secretariat will remedy this situation, publishing these and similar documents in future volumes, rather than resorting to the method that was necessary with the documentation of the San Francisco Conference, that is to say issuing a number of supplementary volumes long after the main series was completed.

L. C. Green.

Un Témoignage sur la Communauté des Six. By P. Wigny. [Luxembourg: European Coal and Steel Community. 1957. 121 pp. 320 frs.]

In 1956 the Assembly of the European Coal and Steel Community considered it opportune to review the workings of the Community and to investigate, particularly in view of the proposed creation of Euratom and a European political community, whether the Community had, for example, produced any change in the level of the standard of living in its member countries; whether the organs of the Community had achieved their objects or had unduly affected the rights of third parties; whether the creation of the Community had in fact contributed to the integration of Europe, and the like. M. Wigny, a member of the Assembly, was rapporteur of the Committee established for this purpose and *Un témoignage sur la Communauté des Six* is his report.

In his report M. Wigny emphasises that the Community is not a simple administrative organ of a technical character, but that it is rather a political authority operating in the field of, and having a radical effect on, Europe's political economy. Bearing this in mind, he has no hesitation in recording his approval of the manner in which the organs have carried out their functions proving that representatives of different States are in fact able, when animated by the same democratic ideology, to work together

in a communal spirit within a parliamentary atmosphere and a European perspective, even though the problems they are called upon to tackle are concrete in the extreme. He is convinced that in such circumstances both a High Authority and a Council of Ministers are indispensable in any European supranational institution. On the other hand, he is equally convinced of the need to maintain the sovereign independence of the member States, which, on the basis of the example set by the European Coal and Steel Community, cannot be considered a block of States hostile to anyone.

M. Wigny pointed out that the Community only operates in a limited sphere and has done so for a very short time, but he was quite certain that, so far at least, the experiment has been encouraging. This may well be true of the political, economic and social repercussions of the Community. From the point of view of the lawyer, constitutional or international, however, M. Wigny's *témoignage* needs to be supplemented.

L. C. Green.

Interamerican Law of Fisheries. An Introduction with Documents. By S. A. Bayitch. [New York: Oceana Publications. London: Stevens & Sons, Ltd. 1957. 119 pp. 35s. net.]

The Geneva Conference on the Régime of the Seas, 1958, failed on the joint question of the limit of territorial waters and the right to fish in what was before the Conference known as the high seas, an area which it would appear is likely to be reduced in extent. Professor Bayitch's little book, which consists of an eleven-page Introduction, followed by ninety-eight pages of text, is valuable in showing what the law was before the Conference opened, and in indicating some of the reasons that might be responsible for the failure.

In view of the attitude adopted by the United States and Canada at the Conference, it is interesting to be reminded that off the coast "a maritime zone is situated, traditionally three miles wide, called the territorial sea. . . . This rule is maintained by the United States" (p. 9). As for Canada, the Customs Act, 1906 (Ch. 58 Revised Statutes of Canada, 1952), provides that "'Canadian waters' shall mean all territorial waters of Canada and all waters forming part of the territory of Canada, including the marginal sea within three miles of the base lines on the coast of Canada, determined in accordance with international law and practice. . . . 'Canadian customs waters' shall mean the waters forming that part of the sea which is adjacent to and extends nine marine miles beyond Canadian waters" (p. 26). Here is an indication from more than fifty years ago of Canada's likings for a twelve-mile limit, at least for limited purposes. Unfortunately, in view of the apparent surprise at Canada's attitude in 1958, Professor Bayitch does not give the source of his statement that "late in 1956 the Canadian Government indicated its intention to extend territorial waters to twelve miles" (p. 27).

The learned author has no hesitation in describing the abandonment of the three-mile rule as "unilateral acts . . . by certain expansionist countries" (p. 11), which would lead to the disappearance of the principle of the freedom of fishing which the present régime of the high seas "has always embodied," and he reproduces among his documents the United States notes of protest to Peru (pp. 39–40), which are typical of the protests submitted by the United States to all those States in Latin and Central America which extended their territorial sea by 200 miles, but which, surprisingly enough, were somewhat backward in putting these extensive demands forward at Geneva.

The documents reprinted in this little book constitute its most valuable asset, and these documents are grouped according to national legislation

of the United States and the other countries in the Western Hemisphere, treaties and other diplomatic documents, the Organisation of American States, and the United Nations, and constitute useful material for those interested in charting a way through these troubled waters. Such navigators, particularly if worried by the post-Geneva future, may derive some solace from the statement that "the status of the high seas once generally recognised—and there is no doubt that such a rule was generally accepted and is still maintained by the great majority of sovereign nations—cannot be changed by unilateral acts. Since such acts violate accepted rules of international law, they do not change the law so violated. . . . It remains a rule of law. It cannot, therefore, be gainsaid by even the most vital interests alleged by the coastal States, such as their security, reliance on seafood, etc. The accepted rule of international law cannot be varied in accordance with the desire of a few nations to have them (*sic*) changed. On the contrary, any rules of international law, once properly established, entitle all nations to rely on the protection of such of their interests as lawfully arise therefrom" (p. 15).

L. C. Green.

Status of Forces Agreements and Criminal Jurisdiction. By Joseph M. Snee, s.j., and A. Kenneth Pye. [New York: Oceana Publications, Inc. 1957. 167 pp. Price in the U.K. £2 15s. net.]

The stationing of foreign troops on the soil of a number of countries in time of peace, is, at least in its present form, a novel experience. This has given rise to a number of legal issues which are regulated by various treaties of which the most important is the NATO Status of Forces Agreement, 1951. This treaty deals not only with the respective jurisdiction of the countries concerned, but also with other matters, such as fiscal immunities and the free movement of the visiting forces from one NATO country to another. The care with which this agreement and other similar agreements (*e.g.*, between the U.S. and Japan) were considered, discussed and drafted has made, on the whole, the actual operation of these treaties a smooth affair. On the other hand, the mere fact of permitting the stationing of troops abroad in time of peace was likely to give rise to political and moral problems which could not easily be solved by reference to the letter of the contractual obligations. How far, for instance, can the government of the visiting forces (which are in the greatest number of cases, American) legitimately allow the receiving country to deal with its own personnel? Or to what extent is the receiving country justified in waiving its jurisdiction on its own soil in favour of the jurisdiction of the visiting forces? Here both constitutional and emotional issues are involved, as it has made abundantly clear by the wide publicity given by the press to a few recent instances, such as the *Girard* case.

The book contains the report of the "field study" by the authors on the exercise of criminal jurisdiction mainly under the NATO Agreements in France, Italy, Turkey and the United Kingdom, which was sponsored by the American Law Institute in co-operation with the Department of Defence. The American Institute and the Georgetown University Law Center provided the financial backing to this enterprise. An imposing list of U.S. officers, who helped the authors in one way or another including Gen. Alfred E. Gruenther, Commander in Chief, SHAPE, is included in the acknowledgments.

The contents are divided into several sections which discuss and illustrate in detail the precise application of the agreements in the field of criminal jurisdiction. Thus, the authors consider the categories of persons who are affected by the agreements, *e.g.*, the interesting question as to the extent in which the agreements affect the legal position of dependent persons, or the difficulties that have arisen in regard to the interpretation of the phrase "in the performance

of official duty." Further, questions of custody, evidence, the right to counsel and the execution of sentences are also discussed and the authors consider the operation of the Status of Forces Agreements particularly from the point of view of U.S. constitutional procedure. It is, indeed, not to be denied that the authors appear to have approached their subject not only with a clear mind but also with a desire to be fair and impartial on a topic likely to arouse strong feelings. Their comparative examination of the European legal systems which they selected for the purposes of this study is generally sound. The conclusion which they arrived at (p. 124) is that there is no justification for the attacks against the agreements and that European judicial procedures, on the whole, afford full protection to U.S. personnel serving abroad. This conclusion may not be novel, it is however interesting, for it shows that the emotional side of these issues is counter-balanced by the existence of a more sober approach. And it would be ungenerous to deny that the authors have a few valuable comparative comments to make on procedure in criminal cases. Indeed, part of the report is well documented and includes not only references to leading Continental text-books but also, in the form of appendices (pp. 144 *et seq.*), the opinions of the U.S. District Court and the Supreme Court in the case of *Girard* v. *Wilson* which, as readers will recall, involved the killing of a Japanese woman by an American army private.

However, the general tone and purpose of this book are more questionable. Thus, although certain aspects have been gone into thoroughly, a great deal is superficial and several sections appear to be no more than journalism. Indeed it is doubtful whether this type of work is suitable for "field study." We would have thought that some solid work in a first class library might have given more profound and accurate results than all the time and money spent in visiting different countries and interviewing an imposing list of U.S. officers. Thus, in places, the discussion of Continental legal procedure is naive. "In comparing the requirements of 'confrontation' in the common-law and in the civil-law systems," write the authors (p. 108), "it is important to remember that in both systems of jurisprudence the sole purpose of a trial is to arrive at the truth." The discussion which follows on the distinction between the inquisitional and the accusational system is no more than a summary description and it is not made clear anywhere else. The book contains also evidence of the following kind. "A former Staff Advocate, USAREUR, has stated . . .", etc. (p. 132); "This point was discussed at some length with the President of a *cour d'appel* and two prosecuting attorneys, and it was evident . . .", etc. (p. 131); "In Turkey this question was discussed with the President of the High Criminal Court, Second Division, and with the Turkish law adviser of the Air Force in Ankara, but there was some difficulty in obtaining a satisfactory answer to our questions, largely because of the language difficulty" (p. 134); "One high-ranking Italian military authority expressed to us the view that the theft of an Italian army vehicle from an Italian military installation or espionage on such an installation would be examples of cases in which an Italian civilian could be subjected to trial by military court. This seems doubtful, however, in view of the provision of the Italian Constitution . . . (Art. 103)" (p. 21). Possibly, reports of this kind may have their uses, although for the reader of this periodical I can see no reason why he should consult this book rather than a more concise and scholarly account of the same subject such as the recent article of Professor Baxter in (1958) 7 I.C.L.Q., pp. 72 *et seq.*

Finally, the present reviewer is completely mystified by the last word of the following quotation copied, it seems, from the case of the *United States* v. *Munsingwear*, Inc. 340 U.S. 36: "that procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment review of which was prevented through happenstance" (p. 151). That this little book (which incidentally has no index of cases or contents) should cost in the United Kingdom £2 15s. is indeed shocking.

A. G. Chloros.

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